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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 284

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD AND BERNHARD-ALTMANN TEXAS CORPORATION, *Respondents*

On Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION, PETITIONER

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BRIEF FOR THE INTERNATIONAL LADIES' GARMENT WORKERS' UNION, PETITIONER

OPINIONS BELOW

The opinion of the court below (R. 129-138) and the dissenting opinion of Circuit Judge Charles Fahy (R. 138-139) are reported at 280 F. 2d 616. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 1-12) and the dissenting opinion of Board Member John H. Fanning (R. 13-16) are reported at 122 N.L.R.B. 1289.

JURISDICTION

The judgment of the Court of Appeals (R. 140-141) was entered on May 19, 1960. The petition for a writ of certiorari was filed on August 1, 1960 and was granted on October 10, 1960 (364 U.S. 811). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

1. Whether settlement of a strike by exclusive recognition of a union in the good faith but mistaken belief that the union had been designated by a majority of the employees in an appropriate unit, is an unfair labor practice by the employer under Section 8 (a) (1) and (2) and by the union under Section 8 (b) (1) (A) of the National Labor Relations Act.

2. Even if Question 1 is answered in the affirmative, whether the collective bargaining agreement entered into subsequent to the settling of the strike and at a time the union had unquestionably been designated by a majority of the employees in an appropriate unit, can properly be held by the Board to be unenforceable by the union and the Board can properly order the employer to withdraw and withhold recognition from the union and the union to cease acting as a collective bargaining representative of any of the employees until it has won a Board conducted election, all solely because of the union's failure to have been designated by a majority when the strike was settled.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, as amended, 29 U.S.C. 151, *et seq.*) are set forth in Appendix A, *infra*, pp. 1a-11a.

STATEMENT

Bernhard-Altmann Texas Corporation, hereinafter called the Employer, is a Delaware corporation, which is engaged in the manufacture of knit wear at San Antonio, Texas (R. 21). In the fall of 1956 its employees began signing authorization cards in the International Ladies' Garment Workers' Union, AFL-CIO, hereinafter called the Union (R. 2, 21-22; 58-60, 123-128).[1] In varying numbers employees from October, 1956, to September, 1957, signed cards designating the Union as their representative for purposes of collective bargaining (R. 22; 123-128). No other labor organization was involved in organizing or seeking to represent these employees (R. 22). At all times prior to August 30, 1957, "the Employer vigorously opposed the Union's efforts," and its employees were aware of this opposition (R. 22; 90).

On July 29, 1957, a substantial number of employees went on strike against the Employer because of a wage reduction in the Topping Department (R. 2, 22; 82). Many of the strikers had signed union authorization cards, although some card signers did not participate in the strike, and during the progress of the strike other employees, both strikers and non-strikers, continued to join the Union (R. 42-43, 58-60, 117-118, 123-128).

During the last week of August 1957, conferences between representatives of the Employer and the Union, to settle the strike, were held in New York City where the home offices of both the Employer and the Union are located (R. 2, 22; 83-85). The Employer

[1] References preceding the semicolon are to the Board's findings, including the findings of the Trial Examiner which were adopted by the Board; succeeding references are to the supporting evidence.

representative did not have any copies of the payroll in New York City (R. 54-55, 121). However, on at least two occasions Employer representatives advised the Union "of the number of people whom (sic) they determined would be working for them or eligible to join the union" (R. 86). At the hearing many months later, it was established that the Employer's payroll for the week ending August 31, 1957 showed 286 employees exclusive of "clericals, plant clericals, watchmen and plant supervisors" (R. 4, 26; 39-41, 46-47, 112-116). Seven of these 286 were probationary employees on that date (R. 82-83). Some 25 others had been hired during the strike, and Employer representatives in New York City assured the Union these were solely temporary (R. 26; 88-90). At this time there was also an undetermined number of employees in layoff status, with the maximum in this group 120, although to the extent that these persons had secured other permanent employment they would not be considered still employees of the company (R. 26; 43-44, 117-118).

The Union representatives had with them in New York City the cards signed by employees authorizing the Union to represent them (R. 84). These cards were turned over to the Union's attorney, Morris Glushien, who was then engaged in conferences with Leo Guzik, the Employer's attorney (R. 84-85). By August 30, 1957 the Union had received 186 cards, all of which were admittedly genuine and valid (R. 58-61, 123-128), although it later turned out that 28 of these cards were signed by employees who were not current employees in the bargaining unit on August 30, 1957 (R. 58-61, 128).

On or about August 30, 1957, in the course of settlement conferences the Union determined that it represented a majority of the employees, on the basis of a comparison of the number of cards in its possession and the number of employees who the Employer stated were "eligible to join the union" (R. 86). The Union then stated to the Employer that it had authorization cards signed by a majority of the employees and requested recognition and bargaining rights (R. 86). The Employer agreed to recognize the Union and settle the strike. Both the Union, in making the claim of majority on August 30, and the Employer in accepting the claim, acted upon the honest and reasonable belief that this claim was true, as the Trial Examiner and Board later found (R. 5, 27; 86).

The Employer and the Union executed a short informal written "memorandum of understanding" on August 30, 1957, reciting that the strike was terminated, that the Employer "recognizes the Union as the exclusive bargaining agent for all production and shipping employees," that all striking employes shall return to work without discrimination, that certain improved wages and conditions of employment were granted and that "formal agreement containing these terms" will "be promptly drafted by the attorneys and signed by both parties within the next two weeks" (R. 2-3, 21-22; 94-95). There was no mention of any requirement of union membership or any form of union security.

On October 10, 1957, the Employer and the Union executed a formal collective bargaining contract, embodying the terms reached in the strike settlement (R. 3, 23; 60-61, 96-111). This contract did not contain any form of union security clause. In this contract

the parties for the first time delineated precisely the bargaining unit for which the Employer recognized the Union (R. 86-88). The contract in this regard provides (R. 97):

> "The bargaining unit covered by this agreement consists solely of all non-supervisory production and shipping department workers employed by said Employer, excluding among others mechanics, machinists, designers, sample department employees, cafeteria employees, time study employees, plant clericals, guards, watchmen, truck drivers, engineers, maintenance men, and janitors."

On October 10, 1957, the date upon which the formal collective bargaining contract was executed (R. 60-61), the Union had been designated as their collective bargaining representative by a majority of the employees in the unit described in the contract (R. 23-24).[2]

Thereafter charges were filed and a complaint issued alleging that the Employer had committed unfair labor practices in violation of Section 8(a)(1), (2) and (3)

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[2] The Board made no finding as to how many were in the appropriate unit on either August 30 or October 10. The largest possible number of employees in the agreed upon unit on October 10 could not have exceeded 383, although it was undoubtedly even smaller because of the uncertainty of the various lists which the General Counsel introduced. Assume the maximum from these lists as follows: 287 from G.C. Ex. 4 (R. 39-43, 46-48, 61-62, 112-116), 120 from G.C. 5 (R. 42-44, 61-62, 117-118), and 12 from the stipulation (R. 60-61). From this, 36 must be subtracted to account for those who it was stipulated had terminated (R. 91-92). A further deduction should be made to eliminate the 25 temporary employees hired during the strike (R. 26; 88-90) although some of these are probably duplicated in the list of 36 terminations. Even without such further reduction the unit would contain 383, of which the Union had a clear majority of 211 (R. 58-60, 123-128).

of the National Labor Relations Act and that the Union had committed unfair labor practices in violation of Section 8 (b) (1) (A) and (2) of that Act (R. 20). After the usual proceedings the Trial Examiner issued his Intermediate Report dismissing the complaint in its entirety (R. 20-30). The Trial Examiner pointed out that the General Counsel had neither alleged nor defined the appropriate unit on August 30, 1957 (R. 25) and that "the record provides no reasonable basis for other than a number of speculative possibilities, both as to what an appropriate unit was on August 30, 1957, and as to precisely how many employees were properly to be counted within any or all of these possible units" (R. 28). The Trial Examiner also found that "all" of the evidence "leads to the reasonable conclusion that both parties were acting in good faith on August 30: the Union in claiming majority, and the Employer in accepting the claim" (R. 27) and that "the Employer and the Union entered into the August 30 memorandum of understanding in good faith" (R. 27).

Upon exceptions filed by the General Counsel, the Board held that it was not necessary to determine what the appropriate unit was on August 30, 1957 nor how many employees were in the unit on that date (R. 4-5), because judged by the standards of the unit which the parties agreed upon in their October 10, 1957 contract, however employees in that unit were counted on August 30, 1957, and however union membership cards were counted, the Union did not have a majority in that unit on August 30, 1957 (R. 4-5). The Board determined that, solely because of such assumed lack of majority, the Employer by entering into the strike settlement with the Union on August 30, 1957 interfered with, restrained and coerced its employees in

violation of Section 8 (a) (1) and contributed support to the Union in violation of Section 8 (a) (2) of the Act (R. 5) and the Union restrained and coerced employees in violation of Section 8 (b) (1) (A) of the Act (R. 6).[3] The Board ruled that the good faith of the Employer and the Union was immaterial (R. 3, 5).

As a remedy for these unfair labor practices the Board entered an order directing the Employer and the Union to cease and desist from the unfair labor practices found (R. 8-12). The Employer was also ordered to cease giving effect to the "memorandum of understanding" dated August 30, 1957 and to the collective bargaining agreement executed October 10, 1957, to cease and desist from recognizing the Union "as the representative of any of its employees for the purpose of dealing with the Company concerning grievances, labor disputes, wages, rates of pay, hours of employment, or other conditions of employment" and to withdraw and withhold recognition from the Union as the exclusive bargaining representative of its employees until the Union shall have won a Board-conducted election (R. 9-10). With respect to the Union, while the Board, in stating what remedy it regarded as necessary, announced it would order the Union to cease and desist from acting as the "collective bargaining representative of any of the Company's employees unless and until" it won a Board election (R. 9), the order by its terms was narrower in that the

[3] There were no other acts of unfair labor practices found. All allegations of individual acts of coercion had been dismissed by the Trial Examiner (R. 30) and no exceptions to this dismissal were filed by the General Counsel or by any other party. The Board expressly recited that the Employer and the Union did not violate the Act except by "recognizing" the Union and "executing a contract with it, at a time when said Union did not enjoy majority status" (R. 8).

Union was ordered to cease and desist from acting as the "exclusive bargaining representative" until it shall have won a Board-conducted election and to cease giving effect to the "memorandum of understanding" of August 30, 1957 and the collective bargaining agreement executed October 10, 1957 (R. 11). The Board however stated in its decision that nothing therein should be construed as requiring the Employer to vary any wage, hour, seniority, or other substantive feature of its relations with its employees which the Employer has established in performance of its contracts with the Union (R. 8-9), or "prejudice the assertion by employees of any rights they may have thereunder" (R. 9-10).

Board Member John H. Fanning dissented from the finding of the majority of the Board "that the Union's acceptance of recognition by the Employer in a contract establishing higher wages and better working conditions for the employees constitutes restraint or coercion of these employees within the meaning of Section 8 (b) (1) (A)" (R. 13-14). Relying upon his earlier expressed disagreement with the majority of the Board in the case of *Curtis Brothers, Inc.*, 119 N.L.R.B. 232, which dissenting views were adopted by this Court in *N.L.R.B.* v. *Drivers Local Union*, 362 U.S. 274, Board Member Fanning stated that if picketing or a strike for recognition by a minority union did not violate Section 8 (b) (1) (A) of the Act, neither could an "employer's *voluntary recognition* of a minority union impose upon that union an unfair labor practice solely on the ground that it *accepted* recognition" (R. 14-15). (Italics Board Member Fanning's.) Board Member Fanning concluded (R. 15):

> "Here was a union that fought hard to secure substantial benefits from a reluctant employer *in a*

> *contract that did not require any employee to be or become a member of the Union.* * * * It seems to me the majority tilts at windmills in holding that the bona fide attempt of a minority union to secure substantial benefits for employees through collective bargaining amounts to unlawful restraint or coercion. I see no wrong doing here and would not fashion an unfair labor practice out of mere error in statistics." (Italics Board Member Fanning's.)

Upon petition by the Union filed in the court below to review and set aside the Board's order, the court below by a two to one decision, with Circuit Judge Charles Fahy dissenting, directed enforcement (R. 129-139). The majority of the court below distinguished this Court's decision in the *Curtis* case (*N.L.R.B.* v. *Drivers Local Union*, 362 U.S. 274) stating (R. 136):

> "In the instant cases the recognition of the minority union is a *fait accompli* depriving the majority of the employees of their guaranteed right to choose their own representative. In the *Curtis Bros.* case the issue was not whether the recognition of the minority union as the exclusive bargaining representative was a violation of the statute. It was only whether the preliminary picketing seeking to gain members and recognition was a violation of Section 8 (b) (1) (A).
>
> "The instant cases do not involve picketing and do not involve either the right of free expression or the right to strike which are protected by § 13 of the Act. * * * The practices involved here, unlike recognitional and organizational picketing, are not specifically limited in the other unfair labor practice provisions of § 8.

The majority of the court held that the action of the Employer in entering into a collective bargaining

agreement with a minority union "would foreclose any other choice of bargaining representative by a majority of the workers in the unit" (R. 133). In reaching this conclusion, that further choice was foreclosed, the majority of the court apparently relied on the current practice of the National Labor Relations Board, known as the contract-bar rule, which treats existing valid collective bargaining agreements as a bar to an election. The court stated (R. 133-134):

> "* * * it is quite likely, under the Board's decisions, that the 'contract-bar' rule would prevent the majority from asserting the union's lack of majority status during the two year term of the contract."

The majority of the court viewed this "foreclosure of the exercise of § 7 rights by the employees" (R. 136) as restraint and coercion by the union in violation of Section 8(b)(1)(A). The majority of the court approved the Board's policy, stating (R. 138) that its

> "net effect * * * is to require that labor organizations and employers refrain from recognizing by agreement a sole bargaining representative until such time as they have adequately established that such agent represents a majority of the employees in the bargaining unit."

Circuit Judge Charles Fahy deemed that the decisions of the Court in the *Curtis* case and in *United Rubber Workers* v. *N.L.R.B.*, 362 U.S. 329, were dispositive of the case and required that the Board's order be set aside in its entirety. Referring to the *Curtis* case, Circuit Judge Fahy stated (R. 138-139):

> "In the absence of an objective explicitly condemned by the Act, such as appears in section

> 8 (b) (4), peaceful economic measures were held not to constitute such restraint or coercion of employees in the exercise of their rights guaranteed by section 7 as to constitute unfair labor practices within the meaning of section 8 (b) (1) (A). From this it seems to me to follow that the obtaining of such recognition by peaceful economic measures, unaccompanied by any unlawful contractual provisions, is not an unfair labor practice on the part of the union under section 8 (b) (1) (A). * * *
>
> "I believe it also follows that the employer on his part does not violate section 8 (a) (1) or section 8 (a) (2) by according such recognition or entering into such an agreement."

The court below on May 19, 1960, entered a judgment enforcing the Board's order in full (R. 140-141).

SUMMARY OF ARGUMENT

I. The good faith belief of an employer and a union that the union has been designated by a majority of the employees in an appropriate unit as their bargaining representative constitutes the proper standard for administration of the collective bargaining obligations of the National Labor Relations Act. The Trial Examiner in the instant case found that both the Employer and the Union in good faith believed the Union had been designated by a majority of the employees on August 30, 1957 when the strike settlement memorandum was signed. The Board held that the good faith of the parties was immaterial and since the majority had not in fact designated the Union, recognition of the Union constituted an unfair labor practice by both the Employer and the Union. In so holding the Board departed from proper standards for administering the statute.

A. The National Labor Relations Act affords a system of self-administration of the rights and duties set forth in the statute without the necessity of governmental intervention. Whenever a majority of the employees in an appropriate unit selects a bargaining representative it is the duty of the employer under Section 8 (a) (5) and of the union under Section 8 (b) (3) to bargain collectively without either the employer or the union first coming to the Board for certification of the union. The statute leaves the parties free to agree on any appropriate unit. The statute likewise leaves the employees free to designate a union by any method, including membership cards, acclamation or ballot.

In this context the Board and the courts over the years have uniformly, except for the instant case, accepted the good faith belief of the employer and the union that the union was the choice of a majority of the employees in an appropriate unit, as an adequate basis upon which exclusive recognition might be granted and valid collective bargaining agreements negotiated. Indeed, the Board and the courts have regularly held it to be an unfair labor practice for an employer to seek proof of majority before according recognition and bargaining when the employer had no good faith doubt of majority. Conversely, if either had a good faith doubt, the refusal to bargain did not constitute an unfair labor practice.

Under the foregoing standard, which was in full force and effect on August 30, 1957, the Employer and the Union would each have been guilty of an unfair labor practice if instead of dealing on the basis of exclusive recognition and settling the strike it had insisted on proof of majority. From that moment on the strike would have been an unfair labor practice strike.

Aside from the fact that the Board is here holding the Employer and the Union to a course of conduct diametrically the opposite of the conduct required by all the numerous Board and Court precedents extant at the time, the new standard applied by the Board and the majority of the court below in the instant case is not consonant with the purposes and policies of the statute. If employers and unions cannot rely in good faith on their determinations of majority, but must proceed at their peril, under a requirement that majority must be "adequately established", they will most surely refuse to bargain collectively without prior Board certification.

Resort by all employers and unions to the Board for certification as a prerequisite to collective bargaining would flood the Board with more cases than it could possibly handle. The delays incident to going to the government for repeated certifications, where no good faith doubt of majority existed, would not only cause a great waste of taxpayers' money but so impede and delay collective bargaining as to make it unworkable. Especially when strikes are threatened or in progress, to require absolutely accurate majority determinations will unnecessarily prolong strikes if it does not make them impossible to settle.

The good faith judgment of an employer and a union made at the time bargaining takes place as to whether the majority of employees desire to be represented, is generally far superior to any determination the Board can make on the basis of a cold record many months later. Certainly, in a strike situation such as prevailed in the instant case, where the employer has always vigorously opposed organizing by the union,

the concession of the employer that a majority of his employees now desire representation by the union is a judgment entitled to great respect. This is especially true when the Board itself is unable to determine which employees should be counted as in the unit on the date of recognition. The Board cannot many months later run an election which will reflect union sentiment at an earlier date. The good faith assessment made on the scene by the parties aware of all the facts is probably in the long run a more valid appraisal of employee sentiment than any the Board can make on the basis of testimony and records.

B. The good faith standard is the prevailing standard by which the law assesses responsibility for conduct in the field of business. It is widely accepted as the governing standard of conduct in property law, negotiable instruments law, corporate law, the law of fiduciary relations and a host of other fields. It is also the principle upon which as a practical matter the business of the world is daily transacted.

Good faith is a general term with an elastic meaning and serves as a symbolic expression denoting the exercise of reasonable care, prudence and diligence. It assumes blameworthiness as the basis for default. Although primitive communities may have tended to protect property by requiring those who impinged to act at their peril, such a concept is inconsistent with the requirements of modern business. The rapid transaction of a great variety of dealings with all sorts of people, involving legal consequences, must be allowed to proceed on the basis of what the actor knows at the moment he acts. Where he has a reasonable belief that he knows enough to act, a requirement that he must make an additional investigation

in order to have an accuracy he judges unnecessary, would slow up business to the point where it could not function.

This Court and Congress have expressly recognized good faith as the appropriate standard in a variety of business transactions governed by federal law.

C. If the law were to impose on the employer or the union the duty of making an absolutely accurate determination of majority as a prerequisite to dealings between them, collective bargaining would prove unduly cumbersome. The determination of majority involves more than taking two known sets of names and seeing if one set contains more or less than twice the number of the other. In order to make an absolutely accurate resolution of the majority issue, determinations of both issues of law and of fact must be made as to which persons are properly within an appropriate unit and which persons have selected the union. The inability of the Board in the instant case ever to decide either how many persons were in the unit or how many had designated the union on August 30 shows how unreasonable it is to require the parties to make such a determination with absolute accuracy before bargaining collectively. Especially is this true when it is remembered that the Board's efforts at determining majority in the instant case were made with its large staff of trained personnel and many months of time in which to collect all available records and witnesses. With the results of all the Board's efforts before him, the Trial Examiner, who saw the witnesses and knew which records were used to prepare the various lists introduced into evidence, held that the Board had failed to prove that the Union did not have a majority.

In strike situations, such as prevailed in the instant case on August 30, 1957, the task of determining with absolute accuracy a majority is often well nigh impossible. The payroll of the employer is woefully useless in determining how many of those on strike are to be included in the unit or how many of the strike-breakers are to be regarded as temporary employees and excluded. In addition there are usually complicated issues of law and fact which must be investigated and resolved to determine the status of persons not currently on the payroll—whether on leave of absence, quit, discharge or lay-off—distinctions which are generally not clearly defined in non-union companies, but which suddenly must be defined in determining whether a majority exists. There is also the question of borderline types of employees such as working foremen and semi-professional employees—should they be within or without the unit?

It is completely unreasonable to ask an employer and a union to delay negotiations to settle a strike while they spend time making the factual investigations and securing the legal opinions necessary to resolve such issues. And even where no strike is in progress, the threat of a strike looms over almost all collective bargaining negotiations for a new contract. Delays may produce a strike. To impose on the parties petty legal details at this crucial point must necessarily lead to bad employment relationships. Rather their good faith determination that the union is the choice of a majority of the employees must be accepted as sufficient, if collective bargaining is to work.

To penalize a union by taking away its contract and representation rights where the employer so represents his payroll as to lead the union to believe in good

faith that it has a majority, encourages employer trickery. To escape a strike situation, he can easily mislead the union into making an advantageous contract, and then place the union in the position where it finds itself deprived of the contract when the employer comes up with another version of his payroll. Moreover, to obtain knowledge of who is active in the union, the employer can insist that to be absolutely certain of the authenticity of union membership cards, he must personally examine them. The good faith standard removes the incentive to employers to engage in such trickery.

If collective bargaining cannot proceed on the same good faith basis as generally governs business dealings, collective bargaining loses its stature as a usual ingredient of modern business. Encumbering its exercise with out worn legalisms discourages the practice and procedure of collective bargaining.

D. Good faith as a standard for determining majority contains as an inherent ingredient a ban on sweetheart agreements or employer selection of representatives for his employees. Unless an employer and a union have made an honest and reasonable determination of majority based on the evidence readily at hand, the employer or the union has not exercised good faith. Such infringements on employee rights as occur when employees and unions engage in collusive arrangements to impose a union on employees against their will or to throw the employer's favor to one of two competing unions will necessarily be excluded, because good faith cannot possibly exist in such situations. The good faith standard leaves the Board full power in each case to judge the employer's and the union's conduct on the bases of

their honesty and reasonableness in determining majority under all the circumstances of the situation in which they acted.

The recognition of a union as the exclusive bargaining representative where both the employer and the union have a reasonable good faith belief that the union is the majority representative does not in fact constitute interference, restraint or coercion of employees or support to a union. The subjective element of employer favoritism, with its coercive effect on employees, is absent when the employer confers recognition in the good faith belief in the union's majority. Neither does the recognition constitute support to a union, either from the point of view of the employer or the employees. Since recognition is nothing more than is due in the situation reasonably assessed, it cannot be support. The grant of only what is legally due is not prohibited support. Section 8 (a) (2) which prohibits support by an employer of a union was adopted by Congress as a means of prohibiting employer domination of company unions. Its legislative purpose has no relationship to the instant type of situation.

That there is no interference, restraint, coercion or support in the situation where employer and union bargain in a good faith but mistaken belief in majority is apparent when it is remembered that the courts hold no such consequences flow from requiring an employer and a certified union to continue bargaining for at least a year after certification although the union has admittedly lost its majority.

II. Collective bargaining between an employer and a minority union does not constitute an unfair labor practice by the employer under either Section 8 (a)

(1) or (2) nor by the union under Section 8 (b) (1) (A). In this connection we distinguish between collective bargaining and exclusive recognition. In situations where both the employer and the union know that the union has only a minority status there is nothing wrong in their engaging in genuine arm's length bargaining and executing contracts in which the union is recognized as the representative of its members only and wages, hours, and terms of employment fixed for all employees. We do not contend, however, that an employer or a union fully aware of the union's minority status can enter into a binding provision in a term contract in which the employer obligates himself contractually to recognize the union as the exclusive representative of all employees in the unit covered by the contract, for the term of the contract. While we do not believe either the employer or the union commits an unfair labor practice by so contracting and while we do not believe the entire contract is invalidated by such a provision, we do admit this sort of a recognition clause would not be legally binding if before the term of the contract expired, a union was selected by a majority and sought exclusive recognition.

A. There is nothing in the Act making bargaining between an employer and a minority union an unfair labor practice.

1. Section 7 of the Act does not guarantee employees any rights which are infringed by genuine arm's length bargaining with a minority union.

The first right which the Board assumed was guaranteed by Section 7 and which it found violated here, the Board described as "the right to bargain independently and individually with their employer in the

absence of a majority representative" (R. 6). But no language appears in Section 7 conferring such a right. The numerous cases holding that an employer may freely discharge any employee for attempting to bargain individually establish beyond peradventure of doubt that Section 7 does not guarantee any right to individual bargaining. If there were any ambiguity in the language, the legislative history of the Act overwhelmingly supports this hitherto unquestioned interpretation. The sponsors of both the original Wagner Act and the Taft-Hartley Amendments regarded the usual industrial worker as completely helpless to bargain individually with his employer. They also took the view that even where some exceptional worker can bargain, one uniform standard of pay, hours and conditions is the usual, as well as the essential, practice in modern industrial establishments and any individual bargaining disrupts this practice; a modern management therefore could not reasonably be expected to try to bargain with individual workers.

The second right which the Board assumed was guaranteed by Section 7 and which it found was violated here, the Board described as "the right to be represented only by a majority representative" (R. 6). This is inconsistent with the well established interpretation of the Act as protecting employees to be represented by minority unions so long as the majority have not agreed upon one union. It is uniformly held that an employer commits an unfair labor practice by discharging or otherwise interfering with, restraining or coercing employees because they are attempting to be represented by or bargain through a minority union. Indeed, this Court in *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 236-237, upheld the right of employees to bargain collectively through

a union which had not established itself as freely chosen by a majority. The legislative history of the Act supports this interpretation. Likewise, the repeated holdings of this and other courts that a union which has lost its majority must be recognized by the employer as the exclusive bargaining representative of his employees in a variety of situations show there is no absolute right not to be represented by a minority union.

The majority of the court below found that the right freely to choose representatives guaranteed by Section 7 was violated because the court assumed that a contract with a minority union would foreclose the employees for the period of the contract from choosing a majority representative (R. 133-134). But there is nothing in the contract here made by the Union and the Employer which restricts any employee in this right. The contract contained no union security clause. The Board is free to run an election at any time and certify another union.

2. An employer by bargaining at arm's length with a minority union does not interfere with, restrain or coerce employees within the meaning of Section 8 (a). (1). There is nothing inherently of a nature which infringes on any employee's freedom to join or not join, to be represented or not be represented, in the mere fact that an employer and a minority union negotiate and sign a collective bargaining agreement, so long as the contract contains no union security provisions. All employees, union as well as non-union, remain as free after the signing of the contract as they were before to exercise their rights to bargain collectively.

Wages set by an employer where there is no majority designation of a union may be determined by the employer in any manner he pleases. He may consult employer associations, personnel advisers or astrologists to determine wages, hours or other conditions. Such unilateral dictation of terms is legal. How then can it be contended that negotiating with a minority union is unlawful? It is necessarily more in keeping with the policies of the Act to have a minority of the employees participate in fixing their employment terms than to have none of them do so.

3. A union which has not yet achieved a majority does not restrain or coerce employees in the exercise of rights guaranteed by Section 7 by bargaining with an employer. The type of union conduct prohibited by Section 8 (b) (1) (A) of the Act, making restraint or coercion by a union an unfair labor practice, does not encompass peaceful measures taken by a union to secure recognition and collective bargaining. This Court's holding in *N.L.R.B.* v. *Drivers Local Union*, 362 U.S. 274, that Section 8 (b) (1) (A) does not bar strikes or picketing for recognition and collective bargaining by a minority union must necessarily mean that this section does not bar peaceful acceptance of recognition and the exercise of representation rights by a minority union.

4. Arm's length bargaining with a minority union does not constitute support within the meaning of Section 8 (a) (2). Genuine bargaining with a minority union is the antithesis of support. It connotes that the employer is not giving the union anything that the union by the exercise of its potential or actual economic strength has not been able to wrest from the employer. In the instant case, where the settlement

agreement terminated a month long strike, certainly the word support cannot be stretched to cover the gains which the union wrested from the employer by the use of the employees' economic strength.

5. By imposing one limitation on bargaining with minority unions, namely the proviso to Section 8 (a) (3) banning union security agreements with a union not chosen by the majority, the statute by implication permits all other bargaining with minority unions.

6. The certification procedures of Section 9 of the Act afford full protection to the right of employees to choose a majority representative unhindered by the existence of contracts with minority unions. The statutory scheme thus provides a means of preserving full freedom of choice without any necessity for construing the unfair labor practice provisions of the statute as banning bargaining with minority unions.

B. The legislative history of the National Labor Relations Act establishes that Congress intended to permit employers and minority unions to bargain collectively subject only to the one restriction that they could not enter into a union security contract. Collective bargaining as practiced in England where it originated and as practiced in the United States prior to the Railway Labor Act Amendments of 1934 and the original National Labor Relations Act of 1935 had proceeded without any requirement that the unions have a majority adherence among the employees as a prerequisite to collective bargaining. Neither in actual practice nor for legal purposes was any inquiry made as to the extent of adherence. It was accepted as common law doctrine that employees could bargain through minority unions.

Congress was fully cognizant that unions often had to make contracts covering shops where they had few members in order to protect their contracts with unionized employers from the competition of non-union shops. The Norris-LaGuardia Act had been tailored by Congress with a view to preventing the use of injunctions to bar picketing for recognition and contracts by unions at establishments where they did not have a majority.

The original Wagner-Connery Bills as introduced in Congress in February 1934 made only one mention of majority, namely that a closed-shop contract was invalid unless made with a majority union. In this connection Senator Wagner pointed out that under existing law contracts with minority unions were valid including those containing a closed shop. The bills provided that it was an unfair labor practice to refuse to recognize or deal with representatives or to fail to exert every reasonable effort to make and maintain agreements and empowered the Board to certify representatives, without specifying any standard for determining representatives. Congressman Connery, as chairman of the House Labor Committee holding hearings on this bill, stated his view that where there was no majority union but several minority unions the Board would designate the largest as the representative.

Various witnesses suggested amending the bill so that collective bargaining would be mandatory after a majority had chosen a union, with an accompanying direction to the Board to certify majority unions. By this they desired to exclude all individual and minority union bargaining once a majority had been selected, while at the same time leaving minority

unions free to bargain collectively until a majority choice evolved.

C. During the decade following the enactment of the National Labor Relations Act collective bargaining with minority unions was widely practiced and unquestionably accepted as legal under the National Labor Relations Act. The major contracts in the auto and steel industries in 1937 and 1938 were executed on the basis of recognition for members only although the contracts by their terms applied to all employees in the units covered. The use of the form of recognition for members only evidenced the failure of the union to establish its majority status. Collective bargaining contracts with unions which had not secured majority status were prevalent in wide segments of American industry. Text writers and administrative agencies repeatedly recited the validity of such bargaining under the National Labor Relations Act.

D. The decisions of this and other courts and the Board have held that bargaining with a minority union is not a violation of the National Labor Relations Act. Indeed, except for the instant case we know of no case in which either the courts or the Board have ever held bargaining with a minority union to be an unfair labor practice if there was no majority union, no union security clause, no rival union and no employer collusion. This Court in *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 232-236, refused to allow the Board to set aside, because of coercive acts of the employer in favor of the contracting union, collective bargaining contracts with a union which concededly had not established its majority status This Court there held that such contracts made with a minority union were valid and served the purposes of the statute

to promote collective bargaining. Other courts have repeatedly recognized the validity of such collective bargaining contracts.

E. To deny bargaining rights to minority unions leaves employees unable to protect themselves during the crucial period while they are organizing and trying to become a majority and makes it impossible to settle strikes where there is no majority union. It also has other undesirable consequences.

III. The unfair labor practices, if any there were, involved in making the strike settlement of August 30, 1957, could not invalidate the subsequent full collective bargaining agreement of October 10, 1957, which was made at a time when admittedly a majority of the employees in the appropriate unit covered by the agreement had designated the Union as their representative. There was nothing in the fact of the execution of the August 30, 1957, strike settlement nor in the terms of that settlement which prevented the employees from freely joining or refraining from joining the Union. Hence authorization cards signed subsequent to August 30, 1957, are entitled to full validity and establish a substantial majority on October 10, 1957.

Furthermore, there is no valid reason for the Board's order barring the Employer from dealing with the Union as the representative of its own members, whether on grievances or otherwise, pending its establishment of its majority in an election.

ARGUMENT

I.

GOOD FAITH BELIEF BY THE EMPLOYER AND THE UNION THAT THE UNION HAS BEEN DESIGNATED AS THEIR BARGAINING REPRESENTATIVE BY A MAJORITY OF THE EMPLOYEES IN AN APPROPRIATE UNIT CONSTITUTES THE PROPER STANDARD FOR THE ADMINISTRATION OF THE COLLECTIVE BARGAINING OBLIGATIONS OF THE NATIONAL LABOR RELATIONS ACT

The good faith belief of both the Employer and the Union at the time they negotiated and executed the first agreement between them (namely the strike settlement of August 30, 1957) that the Union had been designated as the collective bargaining representative by a majority of the employees was expressly found by the Trial Examiner (R. 27) and by the Board (R. 3, 5). The Board held that the good faith of the Employer and the Union was immaterial (R. 3, 5). Rather the Board held that although everyone believed on the basis of reasonable evidence that the Union was the proper exclusive representative, in fact it was not, and hence recognition of, and executing a contract with, the Union was illegal (R. 3-7). In holding that good faith belief that the Union was the majority choice was not a defense, the Board departed from the proper standards for administration of the collective bargaining provisions of the statute.

A. The statutory language, legislative history and administrative and judicial precedents establish "good faith" as the standard for judging majority when the parties desire to bargain without first going to the Board.

The statutory scheme of the National Labor Relations Act, in keeping with the findings and policies set out in Section 1 of the Act, affords a system of self administration by employers and unions of the rights and duties set forth in the statute without the

necessity of resorting to governmental agencies. Section 1 sets forth the Congressional finding that inequality of bargaining power between unorganized employees and corporate employers leads to business depressions, by depressing wage rates and purchasing power of wage earners, whereas collective bargaining by organized employees remedies these conditions. Hence it is established as Congressional policy to encourage collective bargaining. To this end Section 8 (a) (5), coupled with Section 9 (a), imposes on employers and Section 8 (b) (3) imposes on unions the duty to bargain collectively whenever a majority of the employees in an appropriate unit choose a representative. This Court in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 1956, 351 U.S. 62, 74-75, held that these sections imposed a duty on an employer to bargain with a union which had concededly been designated by a majority without either the employer or the union first coming to the Board for certification or any other purpose.

Careful examination of the various mentions of unit in the statute shows Congressional intent to leave the employer and the union free to agree on any appropriate unit.[4] The Act similarly retains complete flexi-

[4] Section 9 (a) uses the expression "Representatives designated or selected • • • in a unit appropriate." Section 8 (a) (3) (i) excepting union security agreements from the ban on discrimination refers to "the appropriate collective bargaining unit covered by such agreement." Section 9 (e) (1) providing for elections to revoke the authority of a union to enter into a union security contract provides for such elections upon petition "by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization." As the Board noted (R. 4, n. 4), in the absence of any violation of law or policy, the Board customarily finds stipulated or agreed upon units appropriate.

bility with respect to the manner in which employees shall designate or select a b[illegible]ining agent. Section 9 (a) provides that the "Representatives designated or selected for purposes of collective bargaining by the majority" shall be the exclusive representative. The legislative history of this section establishes that Congress wished to leave employees free to choose representatives in any manner they desired. See, for instance, the following excerpt from a speech by Bishop Francis J. Haas, a member of the National Labor Board, which was inserted in the Congressional debates preceding enactment of the original National Labor Relations Act. The speech, dealing with Section 7 (a) of the National Industrial Recovery Act, which guaranteed the right of employees to self-organization and collective bargaining, in pertinent part stated:[5]

> "The first essential feature about Section 7 (a) is that it places no restriction on workers in choosing their representatives. It does not require them to choose their bargaining agents from a limited group, for example, fellow workers on the payroll. * * * Likewise, it leaves them entirely free to use any method they want—membership cards, acclamation, or ballot—in selecting their representatives. In a word, it is a worker's selection, and the employer has nothing to say about the representatives to be selected or the method of selecting them."

This Court in *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 1956, 351 U.S. 62, 74, in construing the collective bargaining obligations of the National Labor Relations Act, similarly stated:

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[5] 79 Cong. Rec. 2333, 2 Leg. His. N.L.R.A. 1935, p. 2432.

> "Section 7 recognizes the right of the instant employees to 'bargain collectively through representatives of their own choosing' and leaves open the manner of choosing such representatives when certification does not apply."

The National Labor Relations Board for more than two decades following the enactment of the National Labor Relations Act, followed the foregoing flexible standard. Employee designation or selection of unions by refraining from coming to work during a strike[6] or by acquiescence and support by a majority of the employees of the union's "direction and control of the strike and settlement coupled with the wearing of * * * [union] buttons",[7] was deemed binding on both the employer and the Board.

In this context the Board evolved the standard of good faith belief that a majority had selected the union as the standard applicable where there was no certification. The Board and the courts applied the good faith standard to such an extent that it has regularly been held that an employer violated his duty to bargain collectively with a union if the employer sought to secure from the union proof of its majority where the employer had no good faith doubt of the union's majority. The rule regularly followed by the Board and the courts was stated in *Automotive Supply Co., Inc.*, 1957, 119 N.L.R.B. 1074, 1094-1095, as follows:

> "Respondent contended that the Union had a duty to prove its majority to the Company. This

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[6] *Ekco Products Co.*, 1957, 117 N.L.R.B. 137, 144-145; *United Fruit Co.*, 1939, 12 N.L.R.B. 404.

[7] *United Fruit Co.*, 1939, 12 N.L.R.B. 404, 410; *M. & J. Tracy, Inc.*, 1939, 12 N.L.R.B. 916, 929.

would be true only if the Company had any good faith doubt which here it did not have. *Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263, enfd. as modified 185 F. 2d [sic] (C.A. D.C.), cert. denied 341 U.S. 914. *Artcraft Hosiery Company*, 78 N.L.R.B. 333; *Merchandiser Press, Inc.*, 115 N.L.R.B. 1441, 1449; *N.L.R.B.* v. *Idaho Egg Producers, Inc.*, 229 F. 2d 821 (C.A. 9), enfg. 111 N.L.R.B. 93."

In addition to the authorities cited in the foregoing quotation, see to the same effect: *F. M. Reeves & Sons, Inc.*, 1958, 121 N.L.R.B. 1280; *United Butchers Abattoir, Inc.*, 1959, 123 N.L.R.B. 946, 957; *H. Rothstein Co., Inc.*, 1958, 120 N.L.R.B. 1556; *Top Mode Mfg. Co.*, 1952, 97 N.L.R.B. 1273, enforced, 3d Cir., 1953, 203 F. 2d 482; *N.L.R.B.* v. *W. T. Grant Co.*, 9th Cir., 1952, 199 F. 2d 711, certiorari denied, 344 U.S. 928.

The converse was likewise true. If an employer or a union had a good faith doubt of majority, it was not guilty of an unfair labor practice in refusing to bargain even if the union in fact had been designated by a majority. In *N.L.R.B.* v. *James Thompson & Co.*, 2 Cir., 1953, 208 F. 2d 743, 745, in an opinion by Circuit Judge Learned Hand, the court reversed the Board for failing to accept the Trial Examiner's finding that the employer had a good faith doubt of majority and hence had not violated Section 8 (a) (5) by refusing to bargain. The Trial Examiner's finding of good faith was held binding on the Board.

The Board's holding in the instant case that the Employer and the Union, even though they had no good faith doubt of majority, should have insisted on strict definition of all inclusions in and exclusions from the unit, on strict proof of the number of employees in the unit and on strict proof of the number

of designation cards signed by employees in the unit, is materially inconsistent with the foregoing uniform rule followed by the Board and the courts at all times prior to August 30, 1957 when the alleged unfair labor practices were committed by the Employer and the Union in the instant case.

The Board is now insisting that the Employer and the Union should have committed acts which under then prevailing decisions would have constituted the unfair labor practice of refusing to bargain by insisting first on strict proof of facts as to which they had no good faith doubt. If the Employer or the Union had insisted on strict proof of majority on August 30, 1957, when neither of them doubted that the Union represented a majority, they would have been unable to negotiate and hence the month old strike then in progress would have continued. Under the Board doctrine that an employer or a union who has no good faith doubt of majority commits an unfair labor practice by refusing to bargain, the strike would from that date on have been an unfair labor practice strike and might have resulted in heavy back pay awards.

Aside from the fact that the Employer and the Union are now being held to a standard diametrically opposite to the standard prescribed by Board and court decisions at the time the conduct here involved took place, we submit that the former standard was the correct one under the statute and that the new standard applied by the Board in the instant case is so out of keeping with the purposes and policies of the Act as to constitute an improper standard.

The policy of encouraging collective bargaining will be frustrated on a wide scale if an employer and

a union, neither of whom has any doubt as to the union's majority status, act at their peril in bargaining collectively. Unless good faith is the standard, all employers and all unions will have to go to the Board both for unit determinations and for majority determinations, for there is no reason to apply good faith to the unit determination but absolute accuracy as to the majority determination. Indeed the two are so inextricably interwoven as to defy separation, because one must know the unit before one can determine the majority. For instance in the case at bar, the Union could not have known whether it had a majority unless it had learned from the employer the number in the unit. This determination could not be made until the Employer and the Union agreed on the exact scope of the unit—not only whether it should cover production and shipping employees as opposed to merely production employees or also maintenance employees,[8] and whether a variety of borderline supervisory, mechanical, designing, sample making, truck driving, time study, clerical, cafeteria and engineering employees should be in or out,[9] but also whether it

[8] In most industries production and maintenance employees constitute the core of the appropriate unit whereas in the garment industry the Board has found the unit here agreed upon (R. 94, 97) to be appropriate (R. 4, 28, and cases there cited).

[9] There were 13 categories excluded in the agreement reached October 10, 1957 (R. 97) although even at that time the Employer and the Union were still in disagreement as to whether certain specific employees did or did not fall within the unit (R. 47-48, 52-53, 86-88). At the time the Employer and the Union signed the strike settlement on August 30, 1957, they did not try to work out the exact exclusions and inclusions, other than to agree that the basic unit would be production and shipping employees (R. 86-87, 94) and that strike breakers would be discharged and strikers would be rehired (R. 88-90).

included employees who were probational, temporary, part time, laid off, striking or strike breaking (R. 26; 43-44, 82-83, 88-90, 117-118).

The number of employers and unions which are today engaged in collective bargaining are so greatly in excess of the number that the administrative agencies can process for unit and majority determination as to make the statute completely unworkable should good faith standards be displaced by a standard requiring the employer and union to determine the correct unit and correct majority or suffer the consequences of illegality. There are more than 150,000 collective bargaining contracts currently in effect in the United States, according to the most recent estimates of the Bureau of Labor Statistics.[10] It is safe to state that only a small fraction[11] of these are with certified unions. Furthermore these 150,000 contracts cover only one fourth of the labor force.[12] Should the policy of Congress to encourage collective bargaining be realized with respect to these three fourths as yet not subject to collective bargaining agreements, the frus-

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[10] B.L.S. Bull. No. 1267, Directory of National and International Labor Unions in the United States, 1959 (G.P.O. December 1959), p. 15.

[11] The Statistical Analysis Branch of the National Labor Relations Board keeps cumulative statistics on the number of unions which have won Board conducted elections and has supplied us with the information that from the inception of the Board in 1935 through June 30, 1959, there were 72,336 Board conducted elections won by unions. Neither the Board nor the Department of Labor has any figures as to how many of these elections were won by the same union year after year nor how many unions in all are today certified nor how many contracts are with certified unions. The vast bulk of these 72,336 elections were conducted many years ago and the certifications issued therein are now obsolete.

[12] B.L.S. Bull. No. 1267, op. cit., pp. 1, 15, 16, 21-22.

trations from waiting for government determination of unit and majority would become even greater, and also a great deal of the taxpayers' money would be wasted.

If the *bona fide* determinations of union majority and unit can be upset by the Board when employers and unions have made a mistake in the complicated process of determining unit and inclusions and exclusions therefrom, employers and uncertified unions will in the future be hesitant to enter into collective bargaining agreements without prior Board determination of unit and majority. Increased instability in labor relations must necessarily result if the more than a hundred thousand employers and unions who are today parties to contracts where there is no certification should suddenly become aware that renewing agreements without certification of the union subjects them to such consequences as the rule applied in the instant case entails. The decision below forces them to be certain not only of the union majority at the time of renewal but also that there was a union majority when the prior contract was signed, unless the events incident thereto have been barred by the statute of limitations. Cf. *Machinists Local* v. *N.L.R.B.*, 362 U.S. 411, 425-426. And if the three times as many employers and potential unions who will need to bargain should the policy of encouraging collective bargaining come into complete fruition, similarly realize the perils they face without Board certification, labor relations will be further unstabilized

Especially in strike situations, the decision below, if not set aside, will make it difficult if not impossible to settle many strikes. The parties may not wish to resort to the election process and even if they wish to, the delays which attend petitions for Board conduct

of elections would greatly lengthen strikes should the parties be placed at their peril in signing a settlement agreement without Board certification.

Even where no strike was in progress, this Court recognized that the policy of encouraging prompt signing of contracts in order to avoid strikes is so strong that the delay incident to waiting for a Board-conducted election should not be permitted in the absence of compelling reasons. In *Consolidated Edison Co.* v. *N.L.R.B.*, 1938, 305 U.S. 197, 237, in setting aside a Board order which invalidated contracts made with an uncertified union in which the wages, hours and terms of employment of all employees were fixed and in holding that they should be permitted to continue in effect as contracts recognizing the union as the representative of its members only, this Court said:

> "* * * the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree. * * * The disruption of these contracts, even pending proceedings to ascertain by an election the wishes of the majority of the employees, would remove that salutary protection during the intervening period."

The effect of the rule enunciated below to discourage collective bargaining has been described and discussed in a note on the Board's decision in this case entitled: Restraint and Coercion: Execution of a Collective Bargaining Contract by a Minority Union, 1959, Duke Law Jour. 624, 628-629:

> "This decision also involves federal labor policy considerations which indicate that a different rule might be more desirable. It seems fair to

say that the decision could have the effect of discouraging bargaining contracts because it requires that a union act therein at its peril, good faith being expressly excluded as a defense. A union may be faced with serious difficulty in ascertaining the exact number of employees in a bargaining unit. This certainly would be true in highly seasonal and cyclical industries in which large scale lay offs are common.[20] Hence, at any given moment the exact number of employees may be in doubt or may be reasonably, but mistakenly, ascertained. Furthermore, should the employer be negligent in supplying the union with the correct number of employees in a bargaining unit from the payroll records, the union, under the rule in the instant decision, must share the risk of commiting an unfair labor practice.

"All of these considerations may discourage[21] unions from signing collective bargaining contracts because none of these circumstances would be considered a legitimate defense and because the necessity for making a determination of majority status would cause delay at the most critical

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"[20] Technically, laid-off workers are still employees, but some of them may have obtained permanent equivalent employment elsewhere, in which case they would no longer be so regarded. *American Cyanamid Co.*, 19 N.L.R.B. 1026 (1940)."

"[21] The deterrent effect of the decision is two-fold. In *Bernard-Altmann* [sic], the Board's order directed the union to cease acting as bargaining representative until it had demonstrated its majority status in a Board-conducted election. This is a prerequisite not otherwise mandatory which the union might well desire to avoid because of the delay involved, and because of the ever present possibility of losing the election, which would foreclose additional elections for at least one year. Furthermore, a finding of unfair labor practice by the union would create a psychological atmosphere unfavorable to furtherance of the union's organizational activities."

point in negotiations just prior to signing. Even though the Taft-Hartley Act has retreated from the Wagner Act position of vigorously encouraging the formation of collective bargaining contracts, there is still a very strong national policy favoring industrial stability which is enhanced by the signing of such contracts.[22] Discouragement of collective bargaining contracts is obviously not consonant with national labor policy. It would be unfortunate if *Bernard-Altmann* [sic] should have that undesirable effect." (footnote 22 omitted)

Nor is it at all certain that Board attempts in subsequent unfair labor practice proceedings to determine whether at a prior date a majority of the employees in an appropriate unit desired the union as their representative result in more accurate determinations of majority than the good faith determination of the employer and the union made at the time. For instance, the Board in the case at bar has never been able to determine what was the appropriate unit or how many employees were in fact in it on August 30, 1957. As a strike was then in progress, with the employer attempting to operate the plant with strike breakers (R. 88-90), the problem of determining which employees were in the unit was complicated by the problem of deciding whether strikers or strikebreakers or both were to be regarded as in the unit. Section 9 (c) (3) of the National Labor Relations Act precludes the Board when conducting an election from permitting strikers who are not entitled to reinstatement from voting. Here in negotiating the settlement of the strike, the Employer assured the Union that the strikebreakers were merely temporary employees and would be displaced to permit reinstatement of the strikers (R. 88-90). The Board was unable to determine which groups of employees should have been

counted in the unit (R. 4-6). The record fails to establish any such uncertainty in the minds of the Employer and the Union when they made their calculation of majority preceding their August 30 settlement of the strike.

In addition to the fact that the Employer and the Union at the time they were settling the strike probably had a much clearer idea of which employees were eligible to be counted as in the unit than the Board months later after the actual facts of reshuffling the plant and recalling strikers had taken place, and disclosed a set of events which neither party could reasonably have foretold at the time they counted majority, the Employer and the Union likewise had a much better sense of whether a majority of the employees wanted the Union to bargain for them than the Board could obtain by a mere counting of membership cards months later. Only an election at the time can disclose the true sentiment of workers. But in the absence of an election, the Employer and the Union's good faith assessment of majority sentiment at the time is undoubtedly far superior to the Board's subsequent efforts at determining majority wishes at an earlier date. The Board has no way of determining how the employees would have voted if an election had been conducted on August 30, 1957. The Board has often recognized that other methods of determining majority designation or selection than the mere count of authorization cards is valid.[13] As we have hitherto pointed out Congress did not provide for the signing of authorization cards as the method of designating or

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[13] *Ekco Products Co.*, 1957, 117 N.L.R.B. 137, 144-145; *United Fruit Co.*, 1939, 12 N.L.R.B. 404.

selecting a union. A union could be selected by any method, even one as informal as "acclamation."[14]

In the strike situation prevailing from July 29, 1957 to August 30, 1957, it was easy for both the Employer and the Union to know where the majority choice lay. An employer who has fought a union (R. 90) does not concede that a majority of his employees have selected a union when in fact they have not. By all rational tests, the good faith judgment made on the scene at the time by the employer and the union is far superior to a subsequent Board judgment made on a cold record. To refuse to give effect to the good faith judgment of the Employer and the Union, and impose penalties based on the much less accurate subsequent assessment of the Board, is unsound legalism. Rather the good faith judgment of the Employer and the Union should be accepted.

B. The "good faith" standard is the prevalent standard by which the law judges conduct in the field of business.

The use of good faith as the standard for conduct is prevalent in the business community and in large segments of the law governing the business community. In *Krone* v. *Snapout Forms Co.*, 1950, 360 Mo. 821, 230 S.W. 2d 865, 869, the court expressed and applied this principle. The court said:

> "It was written that faith is 'the evidence of things not seen.' But 'good faith' is more than a state of mind. Under those circumstances it may also be a concrete principle upon which the world's business is daily transacted."

The court held that where defendants were sued for libel on the basis of a letter in which they had accused

[14] 79 Cong. Rec. 2333, 2 Leg. His. N.L.R.A., 1935, p. 2432.

the plaintiffs of having "committed this breach of good faith" by certain business transactions, the issue of whether there was in fact a breach of good faith was a question for the jury and its verdict should not be set aside by the courts.

The wide acceptance of the standard of good faith in property law, negotiable instruments law, corporate law, the law of fiduciary relations and a host of other fields is apparent from examining the variety of uses of the term set forth in 35 C.J.S. Faith, p. 605. There the term is described as follows:

> "*Good faith.* These two words, or their Latin equivalent, appear frequently in the law, constituting a general term with a somewhat elastic meaning, and described as a symbolic expression denoting the exercise of reasonable care, prudence, and diligence."

The classic statement of blameworthiness as the basis of modern legal default appears in Holmes, The Common Law. There he emphasizes that whatever tendency there was in the primitive community to protect property by requiring those who impinged to act at their peril, such a concept "is hardly consistent with the requirements of modern business."[15] He points out that the law recognizes that "the public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no policy in throwing the hazard of what is at once desirable and inevitable upon the actor."[16] "All foresight of the future, all choice with regard to

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[15] Oliver Wendell Holmes, J., The Common Law (Little Brown and Co., 1938, ed.), p. 100.

[16] *Id.*, p. 95.

any possible consequences of action depends on what is known at the moment of choosing. An act cannot be wrong, even when done under circumstances in which it will be hurtful, unless those circumstances are or ought to be known." [17] "The distinctions of the law are founded on experience, not on logic. It therefore does not make the dealings of men dependent on mathematical accuracy." [18]

Good faith is the present legal description for the standard deemed necessary to keep the wheels of the modern business world moving and at the same time hold the actors therein to a standard of reasonable regard for the facts and the law. It recognizes that to hold men to an absolute accuracy as to law or facts would slow up modern business to the point where it could not function.

Even in the field of real property, there is a tendency to recognizing "that the policy of protecting titles must yield to the policy of protecting trade." [19] For instance as early as 1890 this Court in *Searl* v. *School District No. 2 in Lake County*, 133 U.S. 553, 561, held that in eminent domain proceedings the value of improvements made in good faith on real estate should not go to the true owner of the land who under strict property law became the owner of each brick as it was set to construct the building on its land, but rather should go to the good faith improver. This Court there said (at 561):

> "The right of recovery, where the occupant in good faith believes himself to be the owner, is

[17] *Id.*, p. 95.

[18] *Id.*, p. 312.

[19] *Id.*, p. 100.

declared to stand upon a principle of natural justice and equity, * * *."

Similarly see *Canal Bank* v. *Hudson,* 111 U.S. 66, 79-81, construing the term good faith in a statute allowing a purchaser of land in good faith to recover the value of improvements, and *Wright* v. *Matteson,* 59 U.S. 50, 56, construing a statute to permit acquisition of title by adverse possession enjoyed under color of title acquired in good faith. An executor appointed under an invalid will is entitled to compensation out of the estate for her services and expenses if she acted in good faith. *Central Farmer Trust Co.* v. *Pinkham,* 1935, 119 Fla. 444, 161 So. 273, 275.

Congress in regulating business has often specified good faith as the standard to be observed. Sometimes the courts, in construing legislation, find an implied intent on the part of Congress to adopt good faith as the standard. Other times Congress expressly provides that good faith shall be the governing standard. For instance Section 5 (b) of the Trading with the Enemy Act, as amended by Section 301 of the First War Powers Act, 1941, 55 Stat. 838, 50 U.S.C.A. Appendix Section 5 (b) (2) provided:

> "* * * no person shall be held liable in any court for or in respect to anything done or omitted in good faith in connection with the administration of, or in pursuance of and in reliance on, this subdivision, or any rule, regulation, instruction, or direction issued hereunder."

For a construction of the word good faith in this section see *Kiyoichi Fujikawa* v. *Sunrise Soda Water Works Co.,* 9 Cir., 1946, 158 F. 2d 490, 494.

The Emergency Price Control Act of 1942, 56 Stat. 23, 50 U.S.C.A. Appendix Sections 901 *et seq.*, Section 205 (d) provided:

> "No person shall be held liable for damages or penalties in any Federal, State or Territorial Court, on any grounds for or in respect to anything done or omitted to be done in good faith pursuant to any provision of this Act or any regulation agreement thereunder or under any price schedule * * *"

See *Schreier* v. *Siegel*, 1942, 178 Misc. 711, 36 N.Y.S. 2d 97, 101, holding that good faith compliance with regulations issued under this statute was a complete defense to a suit for unfair competition based on conduct regulated by the statute.

The Portal-to-Portal Act of 1947, 61 Stat. 88, 29 U.S.C. 258, Section 9, provides:

> "In any action or proceeding commenced prior to or on or after May 14, 1947 based on any act or omission prior to May 14, 1947, no employer shall be subject to any liability or punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, if he pleads and proves that the act or omission complained of was in good faith in conformity with and in reliance on any administrative regulation, order, ruling, approval, or interpretation, of any agency of the United States, or any administrative practice or enforcement policy of any such agency with respect to the class of employers to which he belonged."

For cases denying employees minimum wages or overtime because the employer acted in good faith within the meaning of the above quoted section see

Addison v. *Huron Stevedoring Corp.*, 2nd Cir., 1953, 204 F. 2d 88, 92-93, certiorari denied, 346 U.S. 877; *Reed* v. *Murphy*, 5th Cir., 1956, 232 F. 2d 668, 676-677, certiorari denied, 352 U.S. 831; *Patton* v. *Roane-Anderson Co.*, 6th Cir., 1951, 192 F. 2d 965; *Ferrer* v. *Waterman S.S. Corp.*, D.C. D.P.R., 1949, 84 F. Supp. 680, 694.

We have not made any exhaustive study of the extent to which Congress has specified good faith as the standard for compliance with its legislative enactments. The foregoing instances do illustrate that there is a wide field in which Congress has adopted good faith as the standard for compliance.

C. To impose on the employer or the union the duty of making an absolutely accurate determination of majority is unreasonable and makes the self-administering features of collective bargaining unworkable.

If the determination of majority required merely the checking of authorization cards against payroll, as the Board's decision in the instant case seems to assume (R. 5), it might not be unreasonable to impose the duty of absolute accuracy as a prerequisite to valid exclusive recognition contracts, assuming that the parties could secure some absolutely neutral person to check the cards without risk of the employer learning the names of union members and further assuming that the Board may properly require employees to designate unions by signing authorization cards, although numerous Board decisions have accepted less formal indications of union selection as equally valid.[20] But the Board's own failure in the instant case to determine how many employees were in the appropriate unit on August 30, 1957, and how many of the em-

[20] See cases cited n. 13, p. 40, *supra*.

ployees in the unit had signed authorization cards prior to that date (R. 4), indicates that the problem is not simply one of counting two sets of names and determining if one set is twice as large as the other. Indeed, the fact that the Board, with its large staff of trained personnel and with many months of time in which to collect all the available records and witnesses, has never yet been able to figure out how many employees were in the unit August 30, 1957 or how many union authorization cards had been signed by this date by employees properly in the unit, shows how completely unreasonable and unworkable it is to impose on employers and unions the duty of making an absolutely accurate determination of these matters as a prerequisite to entering into a valid collective bargaining agreement.

The bland assumption that a payroll and authorization cards are all the employer and the union need to determine majority is completely unfounded. In the instant case with an actual total payroll of 357 employees on August 30, 1957 and 186 union authorization cards, an analysis of the problems of determining majority which appear from the record shows that in excess of a hundred additional items of evidence are necessary, evidence of the type an employer and a union could not even begin to collect and digest as a preliminary to settling a strike. These additional necessary items of evidence relate to four types of issues: (1) how many of those who went on strike are still to be counted as employees eligible to vote if the Board were conducting an election; (2) how many of those hired as strikebreakers are only temporary employees who should not be eligible to vote as both they and the Employer regard them as temporary make weights;

(3) how many different types of jobs represented by persons on the payroll are to be excluded from the unit because they are supervisory, professional or of a character sufficiently unrelated to production work as to treat them as outside the unit; (4) how many persons not presently on the payroll are still employees—whether because they are on leave of absence, sick leave, maternity leave, discharge, quit or lay-off status. These are distinctions which are often treated as without significance in non-union companies and hence records of these matters may not be precise or accurate, but they are matters suddenly of great importance when a union demands recognition. An accurate resolution of each of these types of issues requires extensive data.

With respect to the issue of how many strikers were still employees, the payroll of July 29, 1957 would have been needed to find out that there were 120 employees who had been working on July 29, 1957, who were not on the payroll for August 30, 1957 (R. 4). Undoubtedly both the Employer and the Union regarded a large number of these 120 as strikers who would be reinstated upon the settlement of the strike. But additional evidence as to each individual would be necessary to know he had been off the payroll of August 30 because he was on strike or because of lay-off or other reason. Half of the Union's membership was in this group—88 out of the 186 authorization cards represented employees working on July 29, 1957 but not on August 30, 1957 (R. 4-5). Under the definition of employee set out in Section 2 (3) of the Act, whether or not each of these 120 was an employee on August 30, 1957 depends on whether he ceased work in connection with a labor dispute and whether he had se-

cured other "regular and substantially equivalent employment." Section 2 (3) insofar as relevant to this issue provides:

> "The term 'employee' shall include any * * * individual whose work has ceased as a consequence of, or in connection with, any current labor dispute * * * and who has not obtained other regular and substantially equivalent employment, * * *"

The kind of an investigation which the Employer and the Union would have been required to make to determine if these 120 employees each left work as a striker and had continued his status as a striker without getting other regular and substantially equivalent employment, is not the kind that businessmen ordinarily make in the conduct of their day to day business affairs. Rather we believe the business standard would be to assume that the 88 of the 120 who had signed Union membership cards were strikers and that none of them had gotten other regular and substantially equivalent employment.

In addition to determining that 88 of these 120 were still employees, a further determination as to each is necessary since only such of them as could expect reinstatement would be eligible to vote in a Board conducted election. Section 9 (c) (3) of the Act as it read prior to the 1959 amendments and insofar as here relevant provides:

> "Employees on strike who are not entitled to reinstatement shall not be eligible to vote."

Assuming that the rules applicable to Board conducted elections may be binding on the parties in determining majority, a matter which is far from clear, the

parties would have to determine to what extent the positions of strikers had been filled with permanent employees. This again would not be evident from the payroll. Here the Employer during the discussions with the Union preceding determination of majority told the Union that it intended to reinstate all the strikers, and that the persons newly hired since the strike began were temporary and would be displaced (R. 26; 88-90). Presumably such temporary strike-breakers would not be eligible to be included in the election and hence would not be properly included in determining the number of employees in the appropriate unit on August 30, 1957. Again who these were could not be determined solely by reference to the payroll of August 30, 1957, but would require resort to extrinsic evidence.

In respect to the number of employees in the unit, it was also necessary for the parties to agree upon inclusions and exclusions. On August 30, 1957, when the Employer and the Union settled the strike they had not worked out with any explicitness exactly what categories of employees were to be included or excluded. They had agreed merely on the basic central group of employees in the unit, namely production and shipping employees (R. 86-88, 94). In the subsequent formal contract of October 10, 1957, thirteen specific categories of employees were listed as excluded from the unit (R. 97). It is too much to ask an Employer and a Union to delay settling a strike until a study can be made of all fringe groups and agreement reached on which to include and which to exclude. Here the bargaining unit as finally agreed upon was described in the contract as follows:

> "The bargaining unit covered by this agreement consists solely of all non-supervisory pro-

duction and shipping department workers employed by said Employer, excluding among others mechanics, machinists, designers, sample department employees, cafeteria employees, time study employees, plant clericals, guards, watchmen, truck drivers, engineers, maintenance men, and janitors."

The record in this case does not show how many employees within the unit as defined in October 10, 1957, were on the payroll covering August 30, 1957. The General Counsel for the Board introduced an exhibit showing that the payroll for the week ending August 31, 1957, contained 286 employees exclusive of "clericals, plant clericals, watchmen and plant supervisors" (R. 4, 26; 39-41, 46-47, 112-116). The General Counsel made no effort to prove how many of the persons working on August 30, 1957 fell in eleven excluded categories. The Employer's plant manager testified at the hearing in this case that there were four persons whose status as in or out of the unit was still in dispute (R. 47-48, 52-53), and the Union representative testified that as many as "30 or 40 people" had been in dispute (R. 88). The Trial Examiner, resolving the conflict on the basis of credibility, found that there was "no evidence of a persuasive nature that it [the payroll for August 30, 1957] does not include employees in any or all of some 9 or 10 *other* categories excluded in the October 10 contract" (R. 26, italics the Trial Examiner's). The Trial Examiner also ruled that there was no evidence as to whether or not any of the 120 persons in the list of persons working on July 29 but not on August 30 were actually in the excluded categories (R. 26).

From the foregoing it is apparent that even now we do not know how many employees were on the

payroll for August 30, 1957, if there are excluded mechanics, machinists, designers, sample department employees, cafeteria employees, time study employees, guards, truck drivers, engineers, maintenance men, and janitors (R. 26). We believe it may fairly be inferred the unit specified in the strike settlement memorandum, namely production and shipping employees would be read as excluding most, if not all, the thirteen categories listed in the October 10 agreement as specifically excluded. If these categories were all deducted from the 286 employees which the Board used as the basis of its determination that the Union did not in fact have a majority on August 30, 1957, it might well turn out it did in fact have a majority (R. 4-5).

In making its calculations (R. 4-5) the Board failed to deduct the 25 employees admittedly hired as strike-breakers and whom the Employer regarded as purely temporary (R. 26; 88-90), and the seven probationary employees (R. 82-83). Deducted from 286 employees, this leaves 254 employees. Adding the 88 strikers makes 342 employees exclusive of "clericals, plant clericals, watchmen and plant supervisors." The Union had 186 valid authorization cards on August 30, although it later turned out 28 of these were not current employees on August 30 (R. 58-61, 123-128). But even excluding the 28, though there was no way the parties could reasonably have been expected to exclude these 28 in their calculations on August 30, if 27 of the 342 on the payroll were in the 13 excluded categories, the Union's 158 cards constituted a majority of the unit. It seems likely the group of mechanics, machinists, designers, sample department employees, cafeteria employees, time study employees, truck driv-

ers, engineers, maintenance men and janitors on August 30, 1957, exceeded 27 in number.

We have not brought before this Court the issue of whether the Union actually had a majority on August 30, 1957, however, as we think it is irrelevant and that the good faith belief of the Employer and the Union is controlling. We merely advert to these features of the record, to illustrate how unworkable it would be to make the duty of an employer and a union to bargain collectively dependent upon their accurate count of employees in the unit and of currently effective authorization cards. Significantly, the Trial Examiner was unable to find that the Union did not have a majority and held that the General Counsel had failed to sustain his burden of proving that the Union in fact had only a minority designation. If the Trial Examiner and the Board can thus disagree after careful consideration of a detailed record, surely the parties ought not to be bound to a higher standard of computation.

Especially in strike situations and often in other collective bargaining situations where employees are restive and threatening to strike, for either an employer or a union to insist on all the investigation of facts and securing of legal opinions necessary to an absolutely accurate determination of majority, would lead to prolonging strikes or bringing on of strikes which could be avoided. Where a strike is not in progress or threatened, delays incident to factual investigations into majority and the securing of legal opinions as to inclusions and exclusions can be most disruptive of employee morale and tend to a deterioration in production, labor turnover and generally bad employment relationships.

To make the validity of bargaining relationships depend upon the actual existence of a provable majority encourages employer trickery. To settle a strike, the employer can represent his payroll at a low figure and once the strike is settled, upset the settlement by revealing a large number of employees in the unit. Cf. *Sierra Furniture Co.*, 1959, 123 N.L.R.B. 1198, 1211. Indeed, in the instant case the Trial Examiner stated that both the testimony and demeanor of the Employer's Production Manager Kovalski "raised more than a faint suspicion that he felt it to be his interest to admit" non-existing coercion "in order to get the contract set aside" (R. 29). It should also be noted that the Employer was not sufficiently interested in protecting the contract to file a brief or participate in the proceedings in the court below except to file an answer (R. 130-131).

Also, if an employer must make an absolutely accurate determination of majority, he will necessarily learn the identity of some or all of the union members. This is true whether an employer insists on a check of authorization cards by himself personally or by a neutral person. If in connection with a card check conducted by a neutral person, the employer is called upon to state the employee status of Mary Jones who is not on the payroll because she is off on maternity leave, the employer will know Mary Jones has signed a union card. Such knowledge acquired by interrogation or surveillance would otherwise be an unfair labor practice. It is understandable that unions are reluctant to subject recently organized employees to such scrutiny and possible retaliation, when there is the possibility that the card check will fail to result in recognition of the union.

To make collective bargaining a workable part of modern industry, employers and unions must be able to proceed on the same good faith determinations from the evidence immediately at hand as businessmen usually use in entering into business dealings with the agents of other business entities. This Court in *H. J. Heinz Co.* v. *N.L.R.B.*, 311 U.S. 514, 526, in holding that employers must reduce to writing and sign collective bargaining agreements, recognized the applicability to the collective bargaining process of the usual practices which businessmen use in dealing with each other. To hold that a good faith determination of majority status is insufficient makes the prerequisites to collective bargaining so cumbersome as to discourage use of the collective bargaining process.

D. Good faith as a standard for determining majority affords adequate protection against infringement on employee rights through sweetheart agreements or favoritism among competing unions.

The standard of good faith inherently excludes sweetheart agreements and contracts entered into with one union to give it an advantage over a competing union. Unless an employer or a union has made an honest and reasonable determination of majority based on the evidence readily at hand, the employer or the union has not exercised good faith. For an employer to decide a union had a majority where the evidence showed the employer had no reasonable basis for such belief but rather was acting out of a desire to select or impose a bargaining representative on his employees would fall far short of good faith. In a situation of competing unions, unless the evidence overwhelmingly establishes one of the unions as a majority choice, it may well be that the only good faith course for an employer is to require an election before according either union exclusive recognition. Compare *Midwest*

Piping & Supply Co., Inc., 1945, 63 N.L.R.B. 1060, 1069-1071.

All of the definitions of good faith agree that honesty of motive is an essential ingredient. See for instance the following statement of Circuit Judge Learned Hand in *N.L.R.B.* v. *James Thompson & Co.*, 2 Cir., 1953, 208 F. 2d 743, 745-746:

> "'Good faith' is one form of credibility; it means that the motive that actuated the conduct in question was in fact what the actor ascribes to it: *i.e.*, that what he gives as his motive was in truth his motive. Applied to the case at bar, it means that, when Flanagan said to Cohen, and repeated on the stand, that he did not know whether Cohen had secured a majority and that he wished to find out, he was telling the truth about what he believed."

The good faith standard would always exclude an employer from recognizing a union as the exclusive bargaining representative of his employees because the employer wanted them to be represented by the union rather than because the employer honestly believed a majority of them had selected a union. This standard therefore accords employees full protection against having a union thrust upon them as their exclusive bargaining representative because an employer wants to choose the union with which he will deal. It leaves the Board full power in each case to judge the employer's and the union's conduct on the basis of their honesty and reasonableness in determining majority under all the circumstances of the situation in which they acted.

In the instant case the Trial Examiner found from uncontroverted evidence that (R. 26):

> "* * * it should be emphasized that in this case there is no 'sweetheart' contract element. At no time, so far as the record shows, was there any other labor organization in the picture. For a period of some 8 to 9 months before the strike the Union had been organizing employees—not 'organizing the employer,' and actually in the face of open opposition on the part of the employer."

This was not the typical situation proscribed by Section 8 (a) (2) of the Act. An examination of the legislative history of this section reveals that Congress closely scrutinized Section 8 (a) (2) at the time of the Taft-Hartley Amendments, for Section 10 (e) was amended to guarantee equal treatment for affiliated and independent unions. But Congress significantly did not change the wording of Section 8 (a) (2). It still left this unfair labor practice proscribed in its prior form: "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it * * *." In Section 8 (2) of the Wagner Act, as the legislative history shows conclusively, Congress was dealing only with the "company-union problem" (S. Rep. No. 573, on S. 1958, 74th Cong., 1st Sess., p. 9, 2 Leg. His. N.L.R.A. 1935, p. 2309). The Senate Report clearly stated that this provision was "designed to prevent interference by employers with organizations of their workers that serve or might serve as collective bargaining agencies" (S. Rep. No. 573, p. 10, 2 Leg. His. N.L.R.A. 1935, p. 2309). The committee referred to participation by employers in framing union by-laws, participating in internal management of labor organizations and the like, stating (S. Rep. No. 573, p. 10, 2 Leg. His. N.L.R.A. 1935 p. 2310):

> "The committee feels justified * * * in outlawing financial or other support as a form of unfair

> pressure. It seems clear that an organization or a representative or agent paid by an employer for representing employees cannot command, even if deserving it, the full confidence of such employees."

The report then noted (as did the corresponding H. Rep. No. 1147, on S. 1958, 74th Cong., 1st Sess., p. 17, 2 Leg. His. N.L.R.A. 1935, p. 3066) that the "decision to prevent company interference with employee organization" was influenced by the fact that "70 percent of the employer-promoted unions have sprung up since the passage of Section 7(a) of the National Industrial Recovery Act" (S. Rep. No. 573, p. 11, 2 Leg. His. N.L.R.A. 1935, p. 2310). Section 8 (a) (2) was thus never intended to invalidate an arm's length contract, where the company's conduct toward the union was just the opposite of domination and support.

The recognition of a union as the exclusive collective bargaining representative where both the employer and the union believe in good faith that the union has been designated by a majority of the employees does not in fact constitute interference, restraint or coercion of employees or support to a union. The subjective element of employer favoritism with its ill effects on employee freedom which has been relied upon by the Board in cases where the employer seeks out a union and confers exclusive recognition or favors one of two competing unions with exclusive recognition is absent when the employer confers recognition in a good faith belief that the union has been chosen by a majority. Where, as in the instant case (R. 22; 90), the employer has been fighting the union, and despite the employer's opposition, so many employees join the union that both employer and union believe the union has majority status, there can be no element of

restraint or coercion of non-union employees. Nor in either the eyes of the employer or the employees is the recognition viewed as support to the union. Rather it is nothing more than what the employer and the union believe is legally due. The grant of only what is legally due is not prohibited support. Such exclusive recognition is usually, as here, part of a genuine arm's length agreement providing increased wages and improved working conditions which are beneficial to all employees whether union members or not.

Circuit Judge Fahy, in the court below, relied in part on this ground in his dissent with respect to the Board's finding that the Employer had committed unfair labor practices. Circuit Judge Fahy stated (R. 139):

> "I believe it also follows that the employer on his part does not violate section 8 (a) (1) or section 8 (a) (2) by according such recognition or entering into such an agreement. There was no rival union competing for recognition. Moreover, the employer was not interfering with the freedom of the employees by conferring exclusive recognition in furtherance of the employer's own preference for or desire to assist one union over another. * * *"

It has long been recognized that majority status is not necessarily a controlling desideratum; that there are competing considerations, for example, the need for stable industrial relations, which may outweigh it and may require bargaining by an employer with a minority union. The Board's contract-bar doctrine is one illustration (*infra*, p. 78). Another example is the requirement that an employer and a certified union bargain for at least a year after certification even when the union has admittedly lost its ma-

jority. *Brooks* v. *N.L.R.B.*, 348 U.S. 96, 103. If no unlawful interference, restraint, coercion or support results from recognizing and bargaining with an admittedly minority union as the exclusive representative in such situations, no such unlawfulness is present where there is a good faith but mistaken belief in majority.[20a]

For all of these reasons we believe that the good faith standard, which the Board and the courts have, as far as we can ascertain, uniformly followed except in the instant case, is the proper standard. It was applied by the Trial Examiner in the instant case. It should have been applied by the Board. If applied, it required the dismissal of the complaint.

II

COLLECTIVE BARGAINING BETWEEN AN EMPLOYER AND A MINORITY UNION DOES NOT CONSTITUTE AN UNFAIR LABOR PRACTICE BY THE EMPLOYER UNDER EITHER SECTION 8 (a) (1) OR (2) NOR BY THE UNION UNDER SECTION 8 (b) (1) (A) OF THE NATIONAL LABOR RELATIONS ACT

If we are correct that good faith is the proper standard by which to judge an employer and a union with respect to the validity of their determination of majority, that alone suffices to dispose of this case. But even

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[20a] It should also be remarked that Section 9 (c) (1) (A) of the Act contemplates a lawful recognition demand by a union which represents, not a majority, but merely "a substantial number" of employees. Indeed it is only if the employer "declines to recognize" this demand that the right to a representation election arises. See *Advance Pattern Co.*, 1948, 80 N.L.R.B. 29; cf. *N.L.R.B.* v. *Superior Cable Corp.*, 4th Cir., 1957, 246 F. 2d 539. Thus it appears that Congress contemplated lawful recognition demands by unions representing a "substantial number" rather than a majority of employees. It can hardly have been contemplated that if the employer agrees to recognize rather than "declines to recognize," an unfair labor practice results.

if the Board was correct in holding that the employer and the union acted at their peril in determining majority, we maintain that genuine arm's length bargaining by an employer with a minority union does not constitute an unfair labor practice by the employer under Section 8 (a) (1) or (2) or by the union under Section 8 (b) (1) (A) of the National Labor Relations Act.

In this connection we distinguish collective bargaining from exclusive recognition. As we explain more fully hereinafter, an employer and an admittedly minority union may properly engage in genuine arm's length negotiation and enter into collective bargaining contracts fixing wages, hours and conditions of employment for all employees in an appropriate unit. So long as such a contract contains no recognition clause or limits recognition of the union to representation of present or future members of the union it is entirely legal. We do not contend, however, that an employer or a union when the minority status of the union is known, can enter into a binding clause in a contract for a fixed term of time limiting the employer to recognition of the union as the exclusive representative of all his employees in the unit. While such a clause in a contract with a minority union could not be forced to bar the granting of exclusive recognition to a union chosen by the majority during the term of the contract, the clause does not invalidate the rest of the contract nor does its execution constitute an unfair labor practice by either the employer or the union.

A. There is no provision in the National Labor Relations Act which reasonably construed prohibits genuine arm's length bargaining between an employer and a minority union.

1. Section 7 of the National Labor Relations Act does not guarantee employees any rights which are infringed by genuine arm's length bargaining with a minority union.

Both the majority of the Board (R. 6) and the majority of the court below (R. 133-136) held that the Employer and the Union by entering into the strike settlement agreement of August 30, 1957, infringed upon rights guaranteed to employees by Section 7 of the National Labor Relations Act. The Board specified two rights which it deemed protected by Section 7 and infringed here. These it described as the right to be represented only by a majority union and the right to bargain individually (R. 6). In this respect the Board stated (R. 6):

> "* * * Section 7 of the Act guarantees to employees the right to form, join or assist labor organizations *of their own choosing* as well as the right to refrain from such activity. These rights must, of course, be reconciled with the rights of the majority of the employees in any unit. Section 9 (a) of the Act provides that the representative chosen by a *majority* of the employees in the unit shall be the exclusive bargaining representative of *all* the employees in that unit. Employees have, therefore, not only the right to be represented only by a majority representative but also the right to bargain independently and individually with their employer in the absence of a majority representative." [Italics the Board's.]

The majority of court below found that the right of freedom to choose representatives guaranteed by Section 7 was violated because the court assumed that a contract with a minority union would foreclose the

employees for the period of the contract from choosing a majority representative (R. 133-134). We have no quarrel with the court's construction of Section 7 as giving employees the freedom to choose a representative untrammeled by any limitations thereon imposed by any contract by the employer with a minority union but, as Circuit Judge Fahy dissenting below pointed out (R. 139), there is nothing in a contract with a minority union (where, as here (R. 3), no union security provision is included) which bars employees from complete freedom to join or not to join a union or to proceed the same as if the contract did not exist to get recognition or certification of a union as the exclusive bargaining representative once a majority agrees on a union. We discuss under Sub-paragraph 6 of this Point, pp. 76-79, *infra*, the certification procedures of Section 9 as affording any majority ample machinery for displacing minority contracts. As we there show a contract with a minority union constitutes no impediment to the Board conduct of an election irrespective of the term in the minority union contract. Nor does the existence of a minority union contract constitute any legal impediment to employer recognition of a union chosen by a majority as the exclusive bargaining representative. Hence our answer to the court below is that Section 7 does grant freedom to employees to choose a union but that a contract negotiated in genuine arm's length bargaining with a minority union, does not violate that freedom.

With respect to the rights deemed by the Board to be granted to employees by Section 7, namely the right to be represented only by a majority union and the right to bargain individually (R. 6), we respect-

fully submit that Section 7 does not grant either of these rights.

Section 7 provides:

> "Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3)."

Read literally there is nothing in the foregoing language which even suggests that employees have a right to bargain individually or to bargain only through a majority chosen union. Each employee who ever approached a Board office with a charge that he had been discharged by his employer as a result of his individual efforts at bargaining for himself has been summarily told that the Act only protects concerted activities.[21] In the few instances where complaints have issued in the belief that the individual was acting in concert with others rather than individually, unless the evidence established that the employer was aware of the concerted character of the activity before he discharged, the case has been dismissed by the Board [22] or its order set aside by the

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[21] See Refusal to issue Complaint by General Counsel, Case No. SR-522, June 30, 1960, 46 L.R.R.M. 1255.

[22] See for example *Myers Products Corp.*, 1949, 84 N.L.R.B. 32; *Walls Mfg. Co.*, 1960, 128 N.L.R.B. No. 60.

courts.[23] Obviously Section 7 does not guarantee employees any right to bargain individually.

The legislative history of the Act establishes that the reasons for the failure to protect the right to bargain individually were three-fold: (1) the individual had such unequal bargaining power that he was helpless to bargain as an individual and had to accept whatever terms the employer dictated; (2) in modern industry, in each plant there can only be one scale of wages, hours and terms and conditions of employment which must be equally applicable to all workers similarly situated; (3) it is unworkable if management must spend its time negotiating with each worker. The situation which existed under individual bargaining was described by Bishop Francis J. Haas, a member of the National Labor Board established to administer Section 7 (a) of the National Industrial Recovery Act, during his testimony on the original Wagner Bill, S. 2926, 73d Cong., 2d Sess., as follows:[24]

> "Customarily, the wage relationship prior to June 16, 1933, was referred to as an individual bargain. In point of fact, among the overwhelming number of 48,000,000 workers in the United States there was no bargaining whatsoever. True, for approximately 10 percent there was union collective bargaining. Add to this the individual bargaining of a small percentage of nonunion skilled mechanics, but this was restricted for the most part to the busy seasons of the year. Out-

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[23] *N.L.R.B.* v. *Office Towel Supply Co.*, 2d Cir., 1953, 201 F. 2d 838; *N.L.R.B.* v. *Westinghouse Electric Corp.*, 6th Cir., 1949, 179 F. 2d 507.

[24] Hearings before Senate Committee on Education and Labor on S. 2926, 73d Cong., 2d Sess., p. 116, 1 Leg. His. N.L.R.A. 1935, p. 146.

side these two groups, there was no bargaining at all of whatsoever nature.

"The great mass of workers were, at the time they were hired, simply told what they would get. Very frequently they were not even told. After employment, when piece rates were changed, the foreman simply announced the new rates. He could announce rates as low as he chose, limited only by the shortage of workers standing ready to take jobs. Briefly, the typical employer-employee relationship did not have even the appearance of trading or bargaining. The employer simply notified the worker what wages he was to get and the hours he was to work. * * *"

Senator Wagner during the hearings repeatedly described individual bargaining as "the trade name for exploitation." [25]

The sponsors of the Wagner-Connery Bills were uniformly vocal in pointing out the uniform wage scales prevalent under modern industrial practice and in criticizing the notion that the individual worker had any bargaining power unless he was organized into a union.[26] At the time of the Taft-Hartley Amendments, Senator Taft and other sponsors acknowledged the helplessness of the individual worker and the dic-

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[25] Hearings before Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess., p. 46, 1 Leg. His. N.L.R.A. 1935, p. 1422; Hearings before House Committee on Labor on H.R. 6288, 74th Cong., 1st Sess., p. 18, 2 Leg. His. N.L.R.A. 1935, p. 2492.

[26] Hearings on S. 2926, *op. cit.*, pp. 51, 938-939, 1 Leg. His. N.L.R.A. 1935, pp. 81, 976-977; Hearings on H.R. 6288, *op. cit.*, p. 200, 2 Leg. His. N.L.R.A. 1935, p. 2674; 79 Cong. Rec. 2332, 2333, 2335, 2337, 2438, 7680, 2 Leg. His. N.L.R.A. 1935, pp. 2412, 2430, 2431, 2433, 2434, 2438, 2441.

tation of terms by employers which prevail where the worker is unorganized.[27]

There can be no possible basis for construing Section 7 as protecting the right of an employee to bargain individually.

The notion expressed by the Board in this case that Section 7 guarantees to employees "the right to be represented only by a majority representative" (R. 6), is equally fallacious. It is well established that Section 7 guarantees employees the right to be represented by a minority union so long as the majority have not agreed upon one union. *Consolidated Edison Co. v. N.L.R.B.*, 305 U.S. 197, 232, 236. There are numerous decisions by both the Board and the courts holding that an employer commits unfair labor practices by interfering with, restraining or coercing employees in the exercise of their right to be represented by a minority union.[28] While the Act does not impose upon the employer any duty to deal with a minority union, efforts by employees to obtain representation by a minority union in the absence of a majority union constitute concerted activities within the guarantee of Section 7 and hence protected from economic coercion by Section 8 (a) (1).

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[27] 93 Cong. Rec. 7536-7537, 2 Leg. His. L.M.R.A. 1947, p. 1654; 93 Cong. Rec. 3428, 1 Leg. His. L.M.R.A. 1947, p. 621.

[28] *Douds* v. *Local 1250, Retail Wholesale Department Store Union of America*, 2d Cir., 1949, 173 F. 2d 764, 769; *Olin Industries, Inc.*, 1949, 86 N.L.R.B. 203, 206, 256, enforced 5th Cir., 1951, 191 F. 2d 613, certiorari denied, 343 U.S. 919; *National Linen Service Corp.*, 1943, 48 N.L.R.B. 171, 173, 219, 232; *Louis Rosenberg, Inc.*, 1939, 122 N.L.R.B. 1450, 1464; *Republic Steel Corp.* v. *N.L.R.B.*, 3d Cir., 1939, 107 F. 2d 472, 478, certiorari denied, 309 U.S. 684; *Agar Packing Co.*, 1949, 81 N.L.R.B. 1262, 1264-1265.

A reading of Section 7 fails to disclose any rights which are infringed by genuine arm's length bargaining with a minority union, where the resulting agreement contains no union security provisions and the substantive terms of the agreement are nondiscriminatorily applicable to union and non-union members alike. An employee is no less free to engage in self-organization, to form, join or assist labor organizations, or to bargain through a representative of his own choosing or to refrain therefrom because a minority of his fellow employees have joined a union and, after a strike, have convinced his employer to negotiate an agreement with the minority union according all of his fellow employees better wages, hours and working conditions. So long as the agreement contains no union security provisions, each employee, whether a member of the minority union or not, remains just as free after the agreement as he was before to engage in any form of self-organization, to form, join, or assist labor organizations or to engage in collective bargaining through representatives of his own choosing or to refrain therefrom. Nowhere in Section 7 is there any right specified which excludes an employer and a minority union from negotiating collective bargaining agreements.

Cases, such as this Court's decision in *Brooks* v. *N.L.R.B.*, 348 U.S. 96, 103, and *Medo Supply Corp.* v. *N.L.R.B.*, 321 U.S. 678, 687, holding that an employer must continue to bargain with a union for a reasonable period, even though the union has lost its majority, establish that employees have no absolute right to be represented only by a majority union.

2. An employer by according exclusive recognition to, and bargaining at arm's length with, a minority union does not interfere with, restrain, or coerce employees within the meaning of Section 8 (a) (1).

There is nothing in the conduct of an employer in engaging in genuine arm's length bargaining with a minority union which interferes in the slightest with the right of any employee, whether a union member or not, to join or not to join that, or any other, union, or to engage, or not to engage, in concerted activities for mutual aid and protection.

Quite the contrary, collective bargaining with a minority union furthers the purposes of the Act to protect employees in their freedom to bargain collectively. Surely wages set by negotiations with some of the employees are to be preferred to wages set by employer fiat without negotiation with any of the affected employees. Where the majority of the employees have not selected a union, the employer is by law free to fix wages, hours and other conditions in any manner he in his uncontrolled discretion chooses to fix them. He may consult employer associations, personnel advisers or astrologists to find out what wages, hours or other conditions he should announce to his employees. Why can he not consult one, two, three or any number of his employees or fix conditions through negotiation with the only union which represents any of his employees? Is not genuine arm's length bargaining with a minority union better than no bargaining at all? Can it realistically be said such minority union bargaining, when the majority are not yet organized, deprives the majority of any rights?

The fact that some employees desire a union and the employer acquiesces in entering into a contract with

that union fixing wages, hours and working conditions, leaves all employees as free as before to select or not select that or some other union.

The legislative history of the Wagner Act shows that Congress in Section 2 (3) and (9) adopted the same definitions of "employee" and "labor dispute" as were included in Section 13 of the Norris-La Guardia Act, 29 U.S.C. 113, in order to protect unions from being enjoined from picketing at establishments where they had no members or only a minority because Congress approved of the efforts of labor organizations to eliminate the threat to union standards by competition from non-union plants. In House Report No. 1147, 74th Cong., 1st Sess., pp. 9-10, 2 Leg. His. N.L.R.A. 1935, pp. 3056-3057, the reason for these definitions is explained as follows:

> "The committee wishes to emphasize the need for the recognition as expressed in subsections 3 and 9, that disputes may arise regardless of whether the disputants stand in the proximate relation of employer and employee * * *."

The committee then proceeded to cite *American Steel Foundries* v. *Tri-City Trades Council,* 257 U.S. 184, 209, thus indicating an intent to guarantee the right of minority unions to picket for the purpose of changing wages and working conditions. The *Tri-City* case involved a Trades Council which represented less than a majority of the employees. The Council sought negotiations with the employer after wages were cut by amounts ranging from 2 cents to 10 cents per hour. The manager of the company responded that he "did not recognize organized labor and would not deal with the committee * * *" (257 U.S. at p. 196). Thereupon the Council called a strike and picketed the company.

The express refusal of Congress during its enactment of the Taft-Hartley Amendments to change these definitions shows its intent not to change the law with respect to the right of employers to recognize and bargain with minority unions. The definition of labor dispute in Section 2 (9) of the Wagner Act was retained in the Taft-Hartley Amendments as a matter of deliberate choice, having been omitted from the House Bill partly to reverse Board decisions holding that a labor dispute exists "whenever a union disagrees with an employer on any subject, notwithstanding that the union does not represent employees of the employer * * *" H. Rep. No. 245 on H.R. 3020, 80th Cong., 1st Sess., pp. 18-19, in 1 Leg. His. L.M.R.A. 1947, pp. 309-310. The Senate version, which retained the Wagner Act definition, prevailed in conference, and in the bill. The Congress thus consciously adopted the Board's interpretation of "labor dispute" as including the "stranger" situation, and the present Board is merely trying to read the rejected House view into the statute.

If unions are to be protected in picketing employers, a majority of whose employees have not designated the union, employers certainly do not violate the law by avoiding such picketing by recognizing and bargaining with a minority union. As Judge Fahy, dissenting below, stated (R. 139):

> "* * * The strike was a peaceful one by the only union seeking recognition and bargaining status. The union lawfully obtained the settlement. It would frustrate the union's right so to do were it to be held that the employer, in agreeing to such a settlement, engaged on its part in an unfair labor practice which invalidated the settlement reached. Moreover, it seems to me that the contrary position requires an employer to suffer the consequences of

> a lawful strike without being able lawfully to bring it to an agreed end unless and until the union gains the adherence of a majority of the employees."

We see no way of reading the language of Section 8 (a) (1) as covering the conduct of an employer, where there are no competing unions, and where the employer deals at arm's length and not out of favoritism for one union, in granting exclusive recognition to, and entering into a genuine collective bargaining contract with, a minority union.

3. The type of union conduct prohibited by Section 8 (b) (1) (A) does not include accepting recognition and bargaining while a minority union.

This Court in the case of *N.L.R.B.* v. *Drivers Local Union*, 362 U.S. 274, fully reviewed the legislative history of Section 8 (b) (1) (A) of the Act and held that it does not bar strikes or picketing for recognition of a minority union. This Court determined that the objectives which Congress had in mind in enacting this Section did not encompass such a result as barring peaceful measures taken by a minority union to achieve recognition. This Court there said (362 U.S. at p. 290):

> "* * *8 (b) (1) (A) is a grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threat thereof * * *"

A peaceful request of a union for recognition followed by the signing of a contract when the employer agrees to grant recognition can by no stretch of the imagination be classified as "violence, intimidation, and reprisal or threats thereof." If anything, such claim making and contract signing are much further

removed from the type of conduct to which Section 8 (b) (1) (A) is directed than are strikes and picketing for recognition.

This Court in its decision in the *Curtis* case listed various Board decisions during the first decade after the passage of the Taft-Hartley Act, which gave Section 8 (b) (1) (A) the "limited application" which this Court characterized as "a sounder construction" of Section 8 (b) (1) (A) than the Board's construction in the *Curtis* case (362 U.S. at 290-291). In one of the cases so cited by this Court, *Miami Copper Co.*, 1950, 92 N.L.R.B. 322, 324, the Board dismissed a complaint alleging that a minority union had violated Section 8 (b) (1) (A) by striking and compelling the employer to deal with it in the adjustment of grievances in derogation of the rights of the certified majority union. The Trial Examiner in the *Miami Copper* case found that the employer violated Section 8 (a) (1) and (5) by dealing with the minority union. The Board sustained this finding without passing on its validity solely because the employer failed to file exceptions (92 N.L.R.B. at 324). In dismissing the Section 8 (b) (1) (A) allegations the Board said (92 N.L.R.B. at 324):

> "Where the union's conduct involved violence, threats thereof, or related conduct, or where the union had obtained or was attempting to obtain economic discrimination against particular employees, we have found such conduct proscribed by Section 8 (b (1) (A) No such factors are present here. Standing alone, the fact that the Union's conduct caused the Employer to violate a statutory right of the employees is not sufficient, in our opinion, to bring that conduct within the limitations which the legislative history requires we place on Section 8 (b) (1) (A)."

In the instant case both Board Member Fanning (R. 13-16) and Circuit Judge Fahy (R. 138-139) pointed out that a construction of Section 8 (b) (1) (A) as not directed at peaceful economic measures, such as was adopted by this Court in the *Curtis* case, precludes a finding such as the Board made here that a minority union violates Section 8 (b) (1) (A) of the Act by engaging in collective bargaining and executing an exclusive recognition memorandum.

We submit that this is the correct interpretation of Section 8 (b) (1) (A) of the Act.

4. An employer by according exclusive recognition to, and engaging in genuine arm's length bargaining with, a minority union does not grant it support within the meaning of Section 8 (a) (2).

Genuine bargaining with a minority union is no more support to the union than is genuine bargaining with a majority union. Support connotes the conferring of a financial benefit or some other special privilege demonstrating to the employees that the union enjoys the special favor of the employer.

As Judge Fahy, dissenting in the court below, stated (R. 139):

> "* * * the employer on his part does not violate section 8 (a) (1) or section 8 (a) (2) by according such recognition or entering into such an agreement. There was no rival union competing for recognition. Moreover, the employer was not interfering with the freedom of the employees by conferring exclusive recognition in furtherance of the employer's own preference for or desire to assist one union over another."

Hard fought bargaining gains secured by a union as the result of a strike, whether majority or minority, cannot by any reasonable construction of the word support, be brought within that term. As we have set out

more fully (pp. 57-58, *supra*), Section 8 (a) (2), prohibiting support, was adopted by Congress in an effort to eliminate employer domination of company unions. It cannot properly be applied to bar genuine minority unions from negotiating with an employer in an arm's length effort to secure improved economic conditions for his employees.

5. The ban on union security agreements with minority unions contained in Section 8 (a) (3) indicates Congress intended to leave all other genuine agreements with minority unions valid as long as no majority union had been selected.

The express provision in Section 8 (a) (3) of the statute that a union security agreement must be made with a majority union would have been entirely useless if Congress had believed that the statute made all contracts with minority unions invalid. Section 8 (a) (3) of the Act in this respect provides:

> "* * * nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of the Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made * * *."

Singling out this one type of contract with minority unions for condemnation, by usual rules of *expressio unius est exclusio alterius*, shows that Congress deemed all other types of collective bargaining contracts with minority unions to be still permissible.

6. The certification procedures of Section 9 of the Act afford full protection to the right of employees to choose a majority representative unhindered by the existence of contracts with minority unions.

The majority of the court below found an infringement on the rights guaranteed to employees by Section 7 in the contract with a minority union on the assumption that it would deprive employees of the right to select a majority union as their representative until the contract expired (R. 133-134). There is nothing in the Act nor in the contract which compels this result. If the non-union employees are unhappy at being represented by the Union and doubt its actual majority, they can petition the Board for decertification or join another union and have it file a petition for certification. There is no need to add the unfair labor practice procedures to those that any dissenting employee already has available under Section 9 of the Act to free himself of an unwanted representative. The failure of the law to treat as an unfair labor practice the conduct of either the employer or the union in executing an exclusive recognition contract with a union which does not have majority status, does not mean that the Board must treat the contract as a bar to an election.[29] As Circuit Judge Fahy stated (R. 139):

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[29] From an early date, the Board has followed the policy that "contracts with a labor organization which did not represent a majority of the employees, when made, are clearly no bar to elections." 7th N.L.R.B. Annual Report, 1942, p. 55. In *Stratbury Mfg. Co.*, 1939, 12 N.L.R.B. 618, 620-621, the Board ordered an election in a representation case, notwithstanding the existence of a contract, on a finding that the union did not have a majority on the date the contract was executed, although it later acquired a majority while the contract was in effect. For a recent case stating the rule that a contract recognizing a union as the representative of its members only is not a bar to an election see *Appalachian Shale Products Co.*, 1958, 121 N.L.R.B. 1160, 1164.

"My position does not mean that the recognition in the form given is protected should a majority of the employees at any time repudiate the union or choose another bargaining agent. On the contrary, any existing 'contract bar' policy or regulation of the Board is I think inapplicable to such a contract with a minority union, though made in such circumstances as are presented by this case."

Board Member Fanning, in his dissent in the instant case (R. 15-16), likewise emphasized the difference between Section 8 unfair labor practices and Section 9 procedures for selecting representatives:

"Section 9 of the Act specifically provides methods and procedures whereby employees can select or *reject* any union asserting a claim to be, or established as, their bargaining representative. The resolution of representation cases is a matter entirely within the discretion of the Board. It is in this forum that an employer's recognition or nonrecognition of a particular union is subject to defeasance or affirmation. Where the Board is satisfied that a question concerning representation exists, the Statute does not recognize any contract as a restraint upon the right of employees to make a choice for bargaining purposes. In the instant case the employees were free at any time to petition the Board for immediate decertification of the Union. The Board would then in its discretion decide whether or not the contract barred an election. A decision that the contract operated as an effective bar would, it is true, foreclose the holding of an immediate election, but this restraint upon the right of the employees to quickly repudiate an unwanted representative would be imposed not by the Statute, not by the Union, *but by the Board itself*. I cannot agree that the operation of discretionary Board rules

is sufficient to create an unfair labor practice where none would otherwise exist." (Italics Board Member Fanning's.)

The Board itself has regularly utilized its representation procedures to sort out the collective bargaining agreements which conform to the policy of the Act to provide stability through arrangements made by arm's length bargaining between employers and unions from those agreements which do not achieve this end. Where the Board finds the agreement is of the first kind it treats it as a contract bar to an election. If the contract does not fall in this category the Board directs an election. *Keystone Coat, Apron & Towel Supply Co.*, 1958, 121 N.L.R.B. 880. For a careful analysis of the Board's rulings in this regard see William Feldesman, Contract Bar to Representation Elections, 29 Geo. Wash. L. Rev. 450, December 1960. There the Board's contract-bar policies are summarized as follows (at pp. 451, 464):

> "Essentially, the principles of contract bar developed by the Board over a period of twenty-five years by constant evaluation and reappraisal, and trial and error, resulting in change and readjustment, a substantial amount of which has occurred recently, fall into two main categories. The first is concerned with whether or not the agreement actually stabilizes industrial relations in the manner contemplated by the act. If not, there is no cogent reason to deny an election. And the second involves the appropriate time to conduct an election, granted the contract is of sufficient stature to inject genuine stability in the bargaining relationship and is therefore formidable enough otherwise to preclude a Board-directed vote by the affected employees. For the Board has determined broadly that, while for reasonable periods contractual re-

lationships must remain undisturbed * * * at appropriate intervals employees must be afforded the opportunity to express themselves and register their desires on the question of their representation for collective bargaining purposes. * * *

* * *

"Depending on time and circumstance, the Board as a policy matter may wish to give freedom of choice more weight than stability, or to effect the converse, in working out an accommodation between these two basic statutory concepts. Through the vehicle of the contract bar doctrine the Board may follow whichever course it has thought it wise to pursue." (Footnotes omitted.)

The availability of Section 9 procedures demonstrates that contracts with minority unions, either with exclusive recognition clauses or with members only recognition, do not constitute any impediment to establishing a majority representative, unless the Board itself elects so to administer Section 9 as to permit such contracts to serve as impediments.

B. The legislative history of the National Labor Relations Act shows that Congress intended to permit employers and minority unions to bargain collectively.

We believe that a careful consideration of the legislative history of the National Labor Relations Act establishes that Congress intended to, and by its enactment did, leave minority union bargaining (subject to one restriction, namely, a ban on a closed shop) permissive, in all situations where the mandatory majority union bargaining was inapplicable because a majority had not yet chosen a representative.

The majority rule concept had not been an ingredient of collective bargaining as it was practiced in England nor as it was practiced in the United States prior

to the Railway Labor Act Amendments of 1934 (48 Stat. 1185) and the Wagner Act of 1935 (49 Stat. 991). Then Secretary of Labor Perkins testifying in the hearings on the bill which became the National Labor Relations Act, ascribed the term "collective bargaining" to Beatrice and Sidney Webb. In this respect Miss Perkins testified:[30]

> "The term 'collective bargaining' arose in the early nineties in England, when the trade unions began to come prominently to the foreground, trying to make arrangements with the employers, which covered all of their people in a plant.
>
> "I understand it was Beatrice and Sidney Webb who originated the term 'collective bargaining.' The term seemed appropriate since the workers were no longer carrying on individual negotiations with the employer, but they attempted to get agreements with regard to their work as a group rather than individuals, and the same rule was to apply to all of the groups rather than to apply to John Jones and Sam Smith."

In their writings describing collective bargaining in England the Webbs make it clear that it was not a prerequisite to collective bargaining that the union be designated by a majority and admittedly was in prominent instances a minority union.[31] Interestingly the Webbs point out that exclusion of non unionists from the plant occurred when a majority membership was secured.[32] In this country, unions and employers who conducted their employment relations on the basis of

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[30] Hearings before Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess., p. 57, 1 Leg. His. N.L.R.A. 1935, p. 1433.

[31] Sidney and Beatrice Webb, Industrial Democracy, 1920 ed., pp. 178, 209-212.

[32] *Id.*, p. 215.

collective bargaining prior to the Railway Labor Act Amendments of 1934 and the Wagner Act of 1935, did not concern themselves with whether a majority of the workers affected adhered to the union. While the statement has on occasion been made that the War Labor Board during World War I followed majority rule, in fact the Board did not give any consideration to whether or not a union had been chosen by a majority. Where employers had dealt with unions prior to the war, the Board required them to continue to do so. For unorganized plants it ran elections on the basis of one representative per each one hundred employees.[33]

At common law an employer could bargain with any union, whether or not it represented any of his employees, with respect to whom he might hire and on what terms. While this contract might not bind non-consenting employees contractually, the employer could be held in damages for its breach, if the state recognized contracts with unions as valid and enforceable.[34] In the numerous cases prior to 1935, dealing with collective bargaining contracts at common law, no mention has been found of whether or not the union had a majority designation when it negotiated the contract. In subsequent cases, the courts have stated that employees had a common law right to bargain individually or through unions of their own choice, whether minority or majority. For cases expressly holding that employees at common law had a right to bargain through a minority union see *Douds* v. *Local*

[33] See Russell A. Smith, The Evolution of the Duty to Bargain Concept in American Law, 39 Mich. Law Rev. 1065, 1069-1070 (May 1941); National War Labor Board Bulletin on Procedure, approved October 4, 1918.

[34] See for example *Greenwald* v. *Chiarella*, 1946, 271 App. Div. 213, 63 N.Y.S. 2d 49.

1250, Retail Wholesale Department Store Union, 2 Cir., 1949, 173 F. 2d 764, 769; *Eastwood-Neally Corp.* v. *I.A.M.,* 1938, 124 N.J. Eq. 274, 281, 1 A. 2d 477, 481-482.

In the Norris-La Guardia Act, 47 Stat. 70, 29 U.S.C. 101 *et seq.,* Congress had expressly defined "person participating or interested in a labor dispute" and "labor dispute" so as to embrace disputes between an employer and a union which had none of his employees as members. Section 13, 29 U.S.C. 113. The purpose of these definitions was to leave unions free to picket for recognition and contracts at establishments where they did not have a majority, in order to protect standards in union shops from the competition of non-union shops. *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 503-504, n. 24; *United States* v. *Hutcheson,* 312 U.S. 219, 231, 232; *Fur Workers Union, Local 72* v. *Fur Workers Union, Local 212,* 1939, 70 App. D.C. 122, 105 F. 2d 1, affirmed, 308 U.S. 522.

The original Wagner-Connery Bills as introduced in Congress in February 1934 made only one mention of majority, namely, that a closed shop was invalid unless made with a majority union. This mention appeared in the proviso to Section 5 (6) and insofar as relevant here read as follows:[35]

> "* * * nothing in this Act shall preclude an employer and a labor organization from agreeing that a person seeking employment shall be required, as a condition of employment to join such labor organization * * * if such labor organization is composed of at least a majority of such employers' employees * * * "

[35] Section 5 (6) of S. 2926, 73d Cong., 2d Sess., pp. 5-6, 1 Leg. His. N.L.R.A. 1935, pp. 3-4; Section 5 (6) of H.R. 8423, 73d Cong., 2d Sess., p. 6, 1 Leg. His. N.L.R.A. 1935, p. 1131.

Senator Wagner in connection with this proviso expressed his understanding that under existing law collective bargaining agreements with minority unions were valid, even those including closed shop provisions. In this regard Senator Wagner stated on the floor of Congress preceding enactment, as follows:[36]

> "The virulent propaganda to the effect that this bill encourages the closed shop is outrageous in view of the fact that in two respects it actually narrows the now-existing law in regard to the closed-shop agreement. In the first place, while today an employer may sign a closed-shop contract even with a minority group, the bill provides that he shall be allowed to negotiate such an agreement only with an organization which represents the majority of employees in the appropriate collective bargaining unit covered by such agreement when made."

The original Wagner-Connery Bills as introduced in 1934 proposed generally the scheme ultimately adopted except that there was no provision making the union chosen by a majority the representative of all the employees. Section 5 (2) made it an unfair labor practice for an employer "to refuse to recognize and/or deal with representatives of his employees, or to fail to exert every reasonable effort to make and maintain agreements" and Section 207 (a) empowered the Board to certify representatives,[37] but there was no standard fixed for determining representatives. Congressman Connery, who in addition to being the sponsor of the bill in the House was also chairman of the House Committee on Labor which held hearings and reported the bill, later indicated his belief that

[36] 79 Cong. Rec. 7570, 2 Leg. His. N.L.R.A. 1935, p. 2335.

[37] 1 Leg. His. N.L.R.A. 1935, pp. 3, 11, 1130, 1137.

where there was no majority union but several minority ones, the largest minority union should serve as the representative for purposes of making the collective bargaining contract.[38]

Hearings on the first Wagner Bill began on March 14, 1934 and continued during the ensuing six days. Professor Summer Slichter appearing as one of the first witnesses in support of the Wagner Bill on March 14, 1934, suggested an amendment providing for certification of the representative chosen by the majority, with all bargaining agreements with minority unions entered into within one year after a majority representative had been certified valid only if approved by the certified union. His proposed amendment in the latter regard read as follows:[39]

> "* * * After certification of representatives of employees by the National Labor Relations Board, it shall be an unfair labor practice for the employer at any time within a year of the election, to bargain with other persons purporting to represent the employees, without submitting any agreements to the certified representatives either for approval or for further negotiation, and no agreement governing wages, hours or working conditions made within one year of the certification of employee representatives by the National Labor Board shall be binding on the employees, unless approved by the certified representatives."

There was however no sentiment expressed against genuine bargaining by any organized group in the ab-

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[38] Hearings before House Committee on Labor on H.R. 6288, 74th Cong., 1st Sess., p. 63, 2 Leg. His. N.L.R.A. 1935, p. 2537.

[39] Hearings on S. 2926, *op. cit.*, p. 63, 1 Leg. His. N.L.R.A. 1935, p. 93.

sence of a majority. Most of the early witnesses did not mention majority rule but argued solely for collective rather than individual bargaining. Typical is the following testimony of Professor Robert L. Hale, who testified on the second day of the hearing.[40]

> "* * * If a man wants to work in a steel plant, he does not just go out and work according to his own ideas about how it should be worked; he has to join an organization. Normally, in the case of a steel plant, he becomes an employee of a steel company, and then he has no freedom as to the details of his work whatever; he is a non-voting member of a society. Now, if he belongs to a union in a closed-shop industry, it is perfectly true he has no freedom to work without being a member of the union, but he has a little more freedom through the brotherhood of his union against the restraint imposed upon him by the employer.
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> "Now, of course, any system of organization is liable to have faults at times. A union itself may possibly have faults, and sometimes it has been oppressive of its members, but it is in any event a choice between evils. Government of any sort has certain evils, or may have at particular times, but the only alternative is anarchy, where the evils would be much greater. If he is subject to be governed by the rules of his union he presumably has a little more control over what those rules are than if he is governed solely by the rules laid down by his employer. So I think the moment you reflect a little bit on that notion of individual freedom, you see that it breaks down."

On March 26, 1934, the then pending auto strike was settled with an announcement from President

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[40] Hearings on S. 2926, *op. cit.*, p. 51, 1 Leg. His. N.L.R.A. 1935, p. 81.

Roosevelt stating that proportional representation was to be used to establish bargaining committees."

From thence forth the hearings were filled with arguments and proposed amendments by sponsors of the bill in favor of compelling employers to confer exclusive bargaining rights on the majority representative. Miss Perkins explained the introduction of the majority rule concept into collective bargaining as having occurred quite accidentally by one of the Boards operating under Section 7 (a) of the National Industrial Recovery Act of 1933 (48 Stat. 198). Thus she testified:[42]

> "What I want to point out is that the first steps of the original Labor Board, which was appointed rather hastily, to solve questions under section 7 (a), was along the line of conciliation.
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> * *
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> "There was then one instance where the employer held the view that his employees did not wish to be represented by the union which was claiming to represent them, and some member of the Board suggested in a perfectly simple way, why not take an election, take a vote, and see whether they want to be represented by this unit or not. The vote was taken, and at that time no one ever raised the question as to whether the majority ruled or not. It was taken for granted that in elections the American habit is so fixed upon the idea that the majority rules, that the question was not raised.
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> "It was only after several such elections had been held that someone who was displeased with

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[41] 78 Cong. Rec. 5384, 1 Leg. His. N.L.R.A. 1935, p. 1067.

[42] Hearings on S. 1958, *op. cit.*, p. 58, 1 Leg. His. N.L.R.A. 1935, p. 1434.

the result of the election when the election indicated that the majority of the people in the plant desired to be represented by the outside union, that it was suggested that the minority group within that plant had no direct way of representation.

"We began then to have this discussion and debate as to whether or not the majority did have a right to speak for all of the employees in the plant or not, and this issue came to be an issue which was debated publicly as well as in the circle of those who had the responsibility for bringing about a fair and proper adjustment with the various plants."

No one suggested that in the absence of a majority choice, an employer and a minority union were in any respect, except as to a closed shop, to be inhibited from bargaining collectively. The extreme care with which each statement respecting bargaining with minority unions as constituting an unfair labor practice is expressly limited to the time after a majority union has been selected, manifests that bargaining with a minority union prior thereto is permissible. H. Rep. No. 1147, 74th Cong., 1st Sess., p. 20, 2 Leg. His. N.L.R.A. 1935, pp. 3069-3070, states:

"Section 9 (a) incorporates the majority rule principle * * * As a necessary corollary it is an act of interference (under Section 8 (1)) for an employer, after representatives have been so designated by the majority, to negotiate with individual or minority groups in their behalf on the basic subjects of collective bargaining."

S. Rep. No. 573, 74th Cong., 1st Sess., p. 13, 2 Leg. His. N.L.R.A. 1935, p. 2313, similarly states:

"Majority rule carries the clear implication that employers shall not interfere with the prac-

> tical operation of the right of employees to bargain collectively through chosen representatives by bargaining with individuals or minority groups in their own behalf, after representatives have been picked by the majority to represent all. * * *".

Senator Wagner and all the other sponsors of the legislation similarly carefully limit the time of prohibition on minority union bargaining to the period after a majority union has been chosen.[43] The prohibition on minority union bargaining after a majority union had been designated was not based on any concept that bargaining with a minority union was inherently wrong but rather on the basis that there must be only one agreement applicable to all employees in the unit and that an agreement made by the majority was to be preferred to one made with a minority. In this respect Dean Lloyd K. Garrison, then Chairman of the National Labor Relations Board operating under Public Resolution No. 44, 73d Cong., 2nd Sess.,[44] testified as follows:[45]

> "Here is a collective bargaining unit, let us say, for the sake of simplicity, a plant; all of the men in the plant are doing more or less the same kind of work. If a collective agreement regarding wages and hours is to be worked out with the employer it must necessarily apply to everybody in that unit, everybody in the plant. So that it is not a question of negotiating an agreement with this little group or that little group, because no such agreement is practical. An employer cannot

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[43] 78 Cong. Rec. 3443, 1 Leg. His. N.L.R.A. 1935, p. 16; 79 Cong. 7571, 2 Leg. His. N.L.R.A. 1935, p. 2336.

[44] 78 Cong. Rec. 12453, 1 Leg. His. N.L.R.A. 1935, p. 1255B.

[45] Hearings on S. 1958, *op. cit.*, p. 127, 1 Leg. His. N.L.R.A. 1935, p. 1507.

> give one set of wages and hours to one group and another set to another where they are all doing the same type of work. It has to be an agreement applying to all. Then the only question is where there are two groups of employees, a majority and a minority group, with which shall the agreement be negotiated? It cannot be negotiated with both, because there is going to be only one agreement, and it is to apply to everybody. Is it at all sensible that the employer should negotiate that agreement applying to everybody with the group which represents the fewest employees? That is obviously silly. And it could only lead to trouble and to strife. As a practical matter he must negotiate it with the majority, with the group that represents the bulk of the employees."

Numerous other witnesses gave a similar explanation of their advocacy of mandatory exclusive bargaining with the union chosen by a majority.[46]

Opponents of the Act recognized that the Act protected employees in their efforts to secure minority union bargaining where no majority had yet been established. Harvey J. Kelly, representing the American Newspaper Publishers Association, testified:[47]

> "There is nothing in this bill which would require a union failing to obtain a majority in an election, to abide by the result of that election and cease its efforts to enforce its wishes upon

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[46] Senator Wagner, Hearings on S. 1958, *op. cit.*, p. 43, 1 Leg. His. N.L.R.A. 1935, p. 1419; Senator Wagner, Hearings on H.R. 6288, *op. cit.*, p. 16, 2 Leg. His. N.L.R.A. 1935, p. 2490; Francis Biddle, Hearings on S. 1958, *op. cit.*, p. 81, 1 Leg. His. N.L.R.A. 1935, p. 1457; Dr. Harry A. Millis, Hearings on S. 1958, *op. cit.*, p. 180, 1 Leg. His. N.L.R.A. 1935, p. 1560.

[47] Hearings on S. 1958, *op. cit.*, p. 635, 2 Leg. His. N.L.R.A. 1935, p. 2021.

> both the employees who have rejected its program and the employer."

To the same effect see the Memorandum submitted by the Automobile Manufacturers Association, which stated:[48]

> "In actual practice this means that the labor union accepts the majority rule where it happens to have a majority of the employees in its membership but is not bound by majority rule where the union is in a minority."

We have read the legislative history of the original National Labor Relations Act with great care looking for any expression of a desire to ban genuine collective bargaining with a minority union where no majority union exists and have not been able to find any. Indeed, in the climate of opinion then existing among the Congressmen who supported the legislation, it is unthinkable that they intended to place any inhibition on the only then established form of collective bargaining. They were attempting to further collective bargaining. While they made it mandatory only when a majority chose a union, they meant to protect workers in their efforts to secure majority bargaining by beginning with permissive bargaining on a minority basis where a majority organization had not been achieved.

The legislative history of the Labor Management Relations Act of 1947 likewise contains nothing to indicate that Congress wished to ban employees from bargaining collectively through a minority union when they had not yet achieved majority organization. Sen-

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[48] Hearings on S. 1958, *op. cit.*, p. 608, 2 Leg. His. N.L.R.A. 1935, p. 1994.

ator Taft, who sponsored the amendments in the Senate, repeatedly recognized the helplessness of the individual worker without organization and stated there was nothing in the proposed amendments which changed the full support for collective bargaining present in the original statute.[49] Other Congressmen supporting the Taft-Hartley Amendments made similar statements.[50] While no one expressly stated that minority union bargaining was legal, the implication of statements such as Senator Ellender's that "Collective bargaining was made compulsory, if a union had a majority of the employees in a certain plant," [51] is that collective bargaining remains permissive where a union has as yet only a minority and there is no other union with a majority.

Finally, and most conclusive respecting the Taft-Hartley Amendments, is the fact that they added no new employer unfair labor practices. The only unfair labor practice of unions adopted by the Taft-Hartley Amendments which supposedly applies to ban minority union bargaining, namely, Section 8 (b) (1) (A), has been construed by this Court as inapplicable to this type of union conduct. *N.L.R.B.* v. *Drivers Local Union*, 362 U.S. 274, 290.

For the foregoing reasons we submit that the legislative history of the National Labor Relations Act, as amended, supports our view that there is no provision in the Act which construed reasonably makes it

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[49] 93 Cong. Rec. 3834, 4194, 4361, 4446, 4580, 4675, 7536-7537, 2 Leg. His. L.M.R.A. 1947, pp. 1005, 1098, 1169, 1225-1226, 1244, 1300, 1653.

[50] 93 Cong. Rec. 3428, 3529, 1 Leg. His. L.M.R.A. 1947, pp. 621, 696.

[51] 93 Cong. Rec. 4131, 2 Leg. His. L.M.R.A. 1947, p. 1055.

an unfair labor practice for an employer to grant exclusive recognition to and engage in genuine arm's length bargaining with a minority union in the absence of a majority union.

C. During the decade following the enactment of the National Labor Relations Act bargaining with minority unions was a generally accepted and widely practiced form of collective bargaining.

In the years immediately following the enactment of the National Labor Relations Act many of the most outstanding collective bargaining agreements of the period were made with minority unions. The agreements made by General Motors Corporation and Chrysler Corporation with the United Automobile Workers, C.I.O., on March 12, 1937 settling the sit-down strikes [52] and the agreement made by the United States Steel Corporation with the Steel Workers Organizing Committee on March 17, 1937,[53] were admittedly collective bargaining agreements with unions that had not established a majority status. These contracts fixed wages, hours and conditions of employment for all employees in the appropriate units although the union was only recognized as the representative of its members.

This form of collective bargaining was prevalent in auto, steel and many other segments of American in-

[52] General Motors-Auto Workers Contract, 2 L.R.R. Man. 959; Chrysler-Auto Workers Contract, 2 L.R.R. Man. 964; Herbert Harris, American Labor (1939) pp. 297-303; Robert R. R. Brooks, When Labor Organizes, Yale Uni. Press, 1937, p. 15.

[53] The Twentieth Century Fund, How Collective Bargaining Works, 1942, pp. 522-523; Myron C. Taylor, Ten Years of Steel, pp. 23-45; Labor Relations of United States Steel Corporation, 2 L.R.R. Man. 1009, 1014.

dustry for several years. The General Motors contracts with the UAW-CIO were renewed on a members only basis of recognition until in April 1940, the UAW-CIO won substantial majorities of plant workers in 49 General Motors plants. For the first time it was recognized by General Motors as the exclusive bargaining agent for all production and maintenance workers in the bargaining units in which it won elections.[54] A survey of collective bargaining in the automobile industry in 1938 showed that of 537 contracts entered into with the UAW-CIO, 343 recognized the union as the representative of members only.[55]

The United States Steel Corporation's contracts with the Steelworkers were likewise renewed for several years with a members only recognition clause.[56] Of the 445 contracts entered into by the Steel Workers Organizing Committee by December 15, 1937, 85 percent showed recognition for members only.[57] In 1938, of the 403 steel industry contracts signed (including renewals of expiring agreements) only 155, or 38 percent, limited recognition to members of the union. However, the United States Steel contracts remained in the for-members-only group. Of the 317 contracts

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[54] Frederick H. Harbison, Patterns of Union-Management Relations, 1947, p. 22.

[55] U.S. Dept. of Labor Information Bulletin, Vol. 5, No. 6, William L. Munger, Bargaining in the Automobile Industry (1938), pp. 5, 7; 2 L.R.R. Man. 952, 953.

[56] Robert R. R. Brooks, As Steel Goes, Yale Uni. Press, 1940, pp. 166-167.

[57] Bargaining in the Steel Industry, 3 L.R.R.M. 853, 854; Frederick H. Harbison, Collective Bargaining in the Steel Industry, 1937, pp. 7-8.

signed in the steel industry in 1939, only 56, or 14 percent, stipulated recognition for members only.[58]

In collecting illustrative union recognition clauses a study in 1938 listed members only recognition in 13 instances and exclusive recognition in eight instances. Among the members only recognition were contracts between a rayon manufacturer and the Textile Workers Organizing Committee-CIO, between a silk manufacturer and the same committee, between a steel products manufacturer and two AFL unions, between a public utility and the Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America, AFL, between a cement manufacturer and a Federal Labor Union of the Cement Workers, AFL, between a rubber manufacturer and the United Rubber Workers of America, CIO, between a public utility and the International Brotherhood of Electrical Workers, AFL, and between a publisher and an AFL union. That this was regarded as an accepted form of collective bargaining is apparent from the whole text of the article. The following statement is illustrative:[59]

> "The beginning point of collective bargaining in labor relations is the recognition by an employer of the other party to any contract entered into as the party representing employees.
>
> "Collective bargaining contracts therefore normally include in their first section a provision designating the spokesman for employees and defining the extent to which such spokesman will be recognized as representing the employees.

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[58] Robert R. R. Brooks, As Steel Goes, Yale Uni. Press, 1940, p. 166.

[59] Union Recognition as Shown in Contracts, 1-A L.R.R. Man. 781-782.

"Such union-recognition clauses, as embodied in most recent contracts, generally fall into two different patterns.

"In some contracts, the union is recognized as the exclusive bargaining agent for all employees. In others, the union is recognized as bargaining agent for those employees only who are or may become members of the union.

* * *

"Of the excerpts from contracts appearing below, eight recognize the union as sole bargaining agent for all employees; thirteen recognize the union as spokesman for its members only. * * *"

An examination of studies of collective bargaining made during the late 30's and the 40's shows uniform acceptance of contracts with a minority union as a legitimate form of collective bargaining.

Similarly see Significance of Union Recognition, 2 L.R.R. Man. 936, 938:

"The Board has held, however, that it is not an unfair labor practice for an employer to refuse recognition to union representatives who do not represent a majority of the employees (1-A L.R.R. Man. 35), but neither is it an unfair labor practice for an employer to recognize a minority union as bargaining agent for its members only (1-A L.R.R. Man. 518)."

This practice during the years immediately following the enactment of the Wagner Act shows the prevalence and propriety of collective bargaining agreements with minority unions.

D. The decisions of this and other courts and the Board have held that bargaining with a minority union is not, without more, a violation of the National Labor Relations Act.

This Court in the case of *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 232, 236, upheld contracts executed on the basis of recognition for members only. This Court described the contracts as follows (305 U.S. at 232):

> "* * * the contracts * * * recognize the Brotherhood as the collective bargaining agency of the employees who belong to it * * *"

Although this Court sustained the findings of the Board that Consolidated Edison Company had interfered with, restrained and coerced its employees by acts of favoritism to the Brotherhood, an AFL union, and opposition to the CIO union, this Court held that these unfair labor practices did not invalidate the contracts with the Brotherhood and that the contracts were not otherwise illegal. In this respect this Court said (305 U.S. 197, 236-238):

> "Here there is no basis for a finding that the contracts with the Brotherhood and its local were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act * * *
>
> "The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining * * * there is nothing to show that the employees' selection as indicated by the Brotherhood contracts had been superseded by any other selection by a majority of employees of the companies so as to create an exclusive agency for bargaining under the statute, and in the absence of such an exclusive agency the employees represented by the

> Brotherhood, even if they were a minority, clearly had the right to make their own choice. Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree * * * The disruption of these contracts, even pending proceedings to ascertain by an election the wishes of the majority of the employees, would remove that salutary protection during the intervening period.
>
> "The Board insists that the contracts are invalid because made during the pendency of the proceeding. But the effect of that pendency * * * did not reach so far as to suspend the right of the employees to self-organization or preclude the Brotherhood as an independent organization chosen by its members from making fair contracts on their behalf."

In the case of *Virginian Railway Co.* v. *System Federation*, 300 U.S. 515, 549, n. 6, this Court quoted an interpretation advanced by the then Solicitor General and later Mr. Justice Reed, upholding the right of minority union bargaining under the Railway Labor Act, as follows:

> "* * * If the majority of a craft or class has not selected a representative, the carrier is free to make with any one it pleases and for any group it pleases contracts establishing rates of pay, rules, or working conditions."

Likewise this Court's holding in *N.L.R.B.* v. *Drivers Local Union*, 362 U.S. 274, that a minority union does not violate the Act by striking or picketing for recognition, seems implicitly to accept the validity of bargaining between an employer and a minority

union. This was pointed out by Circuit Judge Fahy, dissenting below, as follows (R. 138-139):

> "* * * The doubts which surrounded the problem presented by this case have been resolved, as it seems to me, by the necessary implications of the recent decisions of the Supreme Court in *N.L.R.B.* v. *Drivers, Chauffeurs, Helpers, Local 639*, 362 U.S. 274, referred to as the *Curtis* case, and *United Rubber Workers* v. *N.L.R.B.*, 362 U.S. 329. The Court held in these cases that peaceful picketing, or a peaceful strike, by a union which did not represent a majority of the employees, to obtain immediate recognition as the exclusive bargaining agent in *Curtis*, or to obtain a contract in *United Rubber Workers*, was not an unfair labor practice under section 8 (b) (1) (A) of the Labor Management Relations Act of 1947, 61 Stat 136, 29 U.S.C. §§ 141-66 (1958). * * *
>
> "I believe it also follows that the employer on his part does not violate section 8 (a) (1) or section 8 (a) (2) by according such recognition or entering into such an agreement. * * * The strike was a peaceful one by the only union seeking recognition and bargaining status. The union lawfully obtained the settlement. It would frustrate the union's right so to do were it to be held that the employer, in agreeing to such a settlement, engaged on its part in an unfair labor practice which invalidated the settlement reached. Moreover, it seems to me that the contrary position requires an employer to suffer the consequences of a lawful strike without being able lawfully to bring it to an agreed end unless and until the union gains the adherence of a majority of the employees."

Circuit Judge Learned Hand in a careful analysis of the statute came to the conclusion that where there was no contract with a majority union, bargaining with

a minority union was legal. In *Douds* v. *Local 1250, etc.*, 2 Cir., 1949, 173 F. 2d 764, 769, he stated:

> "The purpose or scheme, as so amended, seems to us consistent throughout. The certified agent's authority extends to all employees in the 'unit,' including those who have not voted for him; but his election and certification, as such, confer upon him only that authority; they do not, ex proprio vigore, affect the relations between the employer and the employees. They give him power to affect them by contract, but until he chooses to contract, and in so far as his contract leaves open any points in dispute, present or future, the employees retain their common-law right to bargain for themselves, singly or collectively. On the other hand, any bargain they may make is subject to his power to cancel it, for in so doing he acts for them as their agent, as much as though they had expressly authorized him to do so. His power to represent all within the 'unit' is absolute and beyond question; but it does not automatically exclude them."

In *Eastwood-Neally Corp.* v. *I.A.M.*, 1938, 124 N.J. Eq. 274, 281, 1 A.2d 477, 481, the court similarly construed the National Labor Relations Act as permitting minority union bargaining where the majority was not organized. The court said:

> "Neither the defendant union nor the employees' committee has been certified by the Board to be the majority bargaining representative. In the absence of such certification, an employer cannot shut his eyes to other evidence showing clearly who represents the majority. *National Labor Relations Board* v. *Remington Rand*, 2 Cir., 94 F. 2d 862. But in the instant case, complainant and defendant agree that there is no such evidence. In this state of doubt, did Congress intend that an employer must refrain from bargaining with either or both sets of putative representatives?

"Before the day of the statute, employers had, of course, the right to discuss with groups of their employees, wages, hours of employment, etc. Employers could use the information so obtained in making up their minds what terms to offer to their men; they could embody their conclusions in agreements. In the great majority of factories throughout the land, there was, when Congress acted, no labor union or other organization of workmen representing a majority of the employees. Congress probably hoped by the enactment to foster the growth of labor unions and anticipated that in most industrial units engaged in interstate commerce, a majority of the employees would unite in choosing some one labor union as their representative. * * * But no Congressional intervention can be discovered in the statute that when a majority of the employees have not, in fact, selected a bargaining representative, the employer shall refrain from ascertaining by conference—by 'bargaining'—the wishes of different groups of his employees.

* * *

"One more step reaches the situation before me: Rival claimants to the title of majority representative; and fair doubt whose claim is valid. Congress anticipated the case and empowered the Board to decide the issue. In the meantime during the weeks or months that may elapse before the Board is asked to act, or before it reaches a decision, and so long as there remains fair doubt who is the majority representative, the employer may, I believe, lawfully negotiate with anyone willing to confer. Congress aimed to promote and not to prevent collective bargaining. * * *"

The Board itself for many years held that bargaining with a minority union did not by itself constitute an unfair labor practice, although it stated, incorrectly we believe, that the grant of exclusive recogni-

tion would be improper. In *Consolidated Builders, Inc.*, 1952, 99 N.L.R.B. 972, 975, the Board reversed the findings of a trial examiner that an employer had violated Section 8 (a) (1) of the Act by entering into a contract with a minority union establishing wages, hours and working conditions for all employees in the unit. The Board said (99 N.L.R.B. at 975):

> "As it is not a violation of the Act for an employer to enter into an agreement with a union at a time when there is no representative complement in its employ *unless* the employer extends exclusive recognition to that union, it follows that the Respondent did not independently violate Section 8 (a) (1) of the Act by entering into the April 6 agreement with the Operating Engineers." [Emphasis the Board's]

"[5] In *The Hoover Company*, 90 N.L.R.B. 1614, 1618, the Board pointed out that an employer may grant recognition to each of two rival unions on a members only basis, a *fortiorari*, therefore, an employer may grant recognition on a non-exclusive basis to a minority union where, as here, there was no rival union claim."

In *Solvay Process Co.*, 1938, 5 N.L.R.B. 330, the Board dismissed a complaint charging unfair labor practices under Section 8 (1) and (2) of the Act, where the employer recognized for its members only a union which had not established its majority representation.

In many cases the strikers whom the Board ordered reinstated had been participants in strikes conducted by minority unions seeking recognition, e.g., *Cleveland Worsted Mills Co.*, 1942, 43 N.L.R.B. 545. In *Black Diamond S.S. Corp.* v. *N.L.R.B.*, 2d Cir., 1938, 94 F. 2d 875, certiorari denied, 304 U.S. 579, while an election was being held by the Board to determine which of two rival unions represented a majority of the men, one of the unions demanded that the company

bargain with it. The demand was ignored and the union called a strike. The court held that the men had a right to strike and that the strike did not prejudice their right to reinstatement. See also to the same effect *Columbia Pictures Corp.*, 1945, 64 N.L.R.B. 490, 510-515. In no case, so far as we have been able to ascertain, did the Board hold that it was an unfair labor practice for an employer and a minority union to negotiate a contract, so long as there was no union security clause, no rival union and no employer favoritism.

Even where there were rival minority unions and no majority union, the Board at one time held it was perfectly proper for an employer to bargain collectively and enter into contracts with a minority union so long as the contract recognized the union as the representative of its members only and so long as all unions were treated the same.[60]

The public and the labor members of the War Labor Board during World War II, accepted collective bargaining with a minority union as valid. The Board stated:[61]

> "* * * The majority of the Board recognizes that an agreement establishing collective bargaining rights for minority unions can, under certain circumstances, be legally entered into by parties."

In *Thompson Products Co., Inc.*, 1942, 4 W.L.R. 384, 390, the UAW-CIO had requested from the employer a members only contract and if that was not granted, at least recognition for representing its members in the

[60] *The Hoover Company*, 1950, 90 N.L.R.B. 1614, 1618, modified in other respects, 6th Cir., 1951, 191 F. 2d 380; 17th Annual Report N.L.R.B., 1952, p. 124.

[61] *Pacific Mills, Worsted Division*, 1943, 11 W.L.R. 239, 243.

processing of grievances. The War Labor Board, with Chairman William H. Davis, Frank P. Graham and Senator Wayne L. Morse sitting as public members, ordered the employer to grant the latter request stating:

> "* * * the company argues that it is its policy to deal only with a union representing the majority of its employees. Such a policy is not only sound, but is required by law, if a determination has been made as to whether or not any union does in fact represent a majority of the employees. However, no such determination has been made in this case and, therefore, the policy of the company cannot be considered as an argument against the recognition of even a minority union until such time as a majority representative has been chosen in accordance with the law, unless it can be demonstrated that such action would be otherwise improper."

E. To deny bargaining rights to a minority union leaves employees unable to protect themselves during the crucial period while they are organizing and trying to become a majority, makes it impossible to settle many strikes and has other undesirable consequences.

While the instant case is, so far as we have been able to ascertain, the first and only case in which it has been held that either an employer or a minority union committed an unfair labor practice by genuine arm's length bargaining involving neither union security provisions nor a rival union nor employer favoritism, there are expressions of Board doctrine in recent cases which show its thinking and illustrate the unworkable state of law which is developing. The dilemma posed for employers and unions by the rule of the decision below is not soluble under present Board doctrine. For many years, under the decisions described above.

a union and an employer faced with uncertainty as to the majority status of a union, could safely enter into a contract fixing rates of pay, hours and terms of employment for all employees within the unit, so long as the recognition accorded to the union was for its members only. But it is dubious if such a contract is ever valid under present Board doctrine. In *Max Factor & Co.*, 1957, 118 N.L.R.B. 808, 813, the Board pointed out that the General Counsel took the position that a members-only contract is *per se* violative of the Act. The Board there found it unnecessary to pass on the issue, as the members-only contract there had been preceded by an unlawful union security contract. In its order, however, the Board did forbid recognition "even limited to its members" until the union should win a Board-conducted election.

It is today settled that a members-only contract with a majority union is illegal because it violates the duty of a majority union to represent all employees.[62] A members-only contract even with a minority union is illegal if it provides different benefits for union than for non-union members.[63]

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[62] See *N.L.R.B. v. Gaynor News Company, Inc.*, 2d Cir., 1953, 197 F. 2d 719, 722, where the court said: "The union here represented the majority of employees and was the exclusive bargaining agent for the plant. Accordingly, it could not betray the trust of non-union members by bargaining for special benefits to union-members only, thus leaving the non-union members with no means of equalizing the situation." This language was quoted with approval by this Court in affirming that decision, 347 U.S. 17, 37-38.

[63] *Newark Newsdealers Supply Co.*, 1951, 94 N.L.R.B. 1667, 1668-1669; Annotation: Unfair labor practices; discrimination between union members and non-members as to wage increases, vacations and the like, 41 A.L.R. 2d 654, 655-656, § 2. In general: where union bargains for its members only: *Jandel Furs*, 1952, 100 N.L.R.B. 1390, 1392-1393; *Seaboard Terminal*, 1955, 114 N.L.R.B. 1391, 1396.

The Board also holds that the inclusion in a contract, which recites it is for the members only, of the same provisions for all employees, establishes the contract as actually an exclusive recognition contract.[64] The error in these decisions is the assumption that the contract grants exclusive recognition to the union because it contains provisions making the wages, hours and terms of employment there established applicable to all employees in the unit. Applicability of conditions to all is one thing; exclusive recognition barring recognition of any other union is quite another. Congress intended that all contracts with unions fixing wages, hours and working conditions should be equally applicable to union and non-union members alike. The House Report on the bill which became the Wagner Act[65] stated:

> "* * * There cannot be two or more basic agreements applicable to workers in a given unit; this is virtually conceded on all sides. If the employer should fail to give equally advantageous terms to non-members of the labor organization negotiating the agreement, there would immediately result a marked increase in the membership of that labor organization. On the other hand, if better terms were given to non-members, this would give rise to bitterness and strife, and a wholly unworkable arrangement whereby men performing comparable duties were paid according to different scales of wages and hours. Clearly then, there must be one basic scale, and it must apply to all"

[64] *Herff Jones Co.*, 1952, 97 N.L.R.B. 1070, 1071-1072; *Sunbeam Corp.*, 1952, 99 N.L.R.B. 546; *Alco-Gravure, Division of Publications Corp.*, 1959, 124 N.L.R.B. 1027, enforced by consent, 6th Cir., 1960, 45 L.R.R.M. 2899.

[65] H. Rep. No. 969 on H.R. 7978, 74th Cong., 1st Sess., p. 18, 2 Leg. His. N.L.R.A. 1935, p. 2928. See also H. Rep., *op. cit.*, p. 19, 2 Leg. His. N.L.R.A. 1935, p. 2929.

The Senate Report and numerous statements by sponsors of the legislation are uniformly to the same effect.[66]

There is nothing about the fact that the agreement provides that all employees in the unit shall have the same terms which means that the union is thereby recognized as the exclusive representative of all employees. Rather in the absence of an express grant of exclusive recognition, there is nothing in the fixing of rates and conditions for all employees which suggests they may not be represented individually or by any other union in bargaining for still better terms for themselves and all employees in the unit. The only sound legal difference between a majority union and a minority union, aside from union security, is that the majority union can make a contract which will bar another determination of majority for the term of the contract, and during that term exclude individual and other union bargaining. A minority union can negotiate the same contract so far as wages, hours and terms of employment are concerned but cannot properly bar a majority determination at any time.

To hold that a union has no power to bargain at all until it has a majority leads to many ludicrous results. Today, with strike breakers eligible to vote in union elections and hence presumably to be counted along with strikers in the unit unless it is clear the strike-breakers are merely temporary employees, it is often

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[66] S. Rep. No. 730, on S. 1958, 74th Cong., 1st Sess., p. 13, 2 Leg. His. N.L.R.A. 1935, p. 2313; Hearings on S. 1958, 74th Cong., 1st Sess., pp. 43, 81, 875, 4 Leg. His. N.L.R.A. 1935, pp. 1419, 1457 2 Leg. His. N.L.R.A. 1935, p. 2261; Hearings on H.R. 6288, 74th Cong., 1st Sess., pp. 16, 278, 2 Leg. His. N.L.R.A. 1935, p. 2490, 2752; 79 Cong. Rec. 7571, 7672, 2 Leg. His. N.L.R.A. 1935, pp. 2336, 2390.

impossible to be at all certain in many strike situations that the striking union does have majority status. But if it is an unfair labor practice for an employer and a minority union to negotiate, the strike must drag wearily on with the employer and the union unable to negotiate its termination until the union gets a majority. That this is not a mere absurd hypothesis is evident from the fact that in at least one of the large strike settlements of the recent past, charges are on file with the Board attempting to upset the whole strike settlement on the basis that the AFL-CIO union a party to it was not the majority representative entitled to recognition by the employer when it was signed. *Wilson & Co.*, N.L.R.B. Cases Nos. 17-CA-1652, 1653, 1654, 18-CA-1167, 1168, 21-CA-4086.

In *Local No. 259, UAW* and *Famelli Ford Sales, Inc.*, Case No. 2-CP-48, Intermediate Report, December 21, 1960, 47 L.R.R.M. 138, the General Counsel issued a complaint alleging that a minority union by picketing to secure reinstatement of a discharged employee was seeking recognition on the theory that to get rid of the pickets the employer would have to recognize and negotiate with the minority union.

Traditionally unions have organized by proving their worth to their members and potential members through gains secured by agreements negotiated before full majority status was achieved. The Board's present policy ties the hands of unions so they can take no economic action to protect their members or improve their conditions until full majority status is achieved. This makes the problem of organizing a sizeable appropriate unit very difficult for members may have to go through a long organizing period before realizing any benefits from union membership. And

even worse, during this period they may often suffer economic coercion from the employer which historically would be met by direct action but which under present Board doctrine can only be remedied by slow technical proceedings before the Board.

The problem of organizing and achieving majority status is still a major one in the United States. The proportion of union members in the labor force today is about one out of four. The proportion of workers covered by collective bargaining agreements is estimated as about the same. The Department of Labor, Bureau of Labor Statistics, conducts biennial surveys of the growth of union membership and collective bargaining. The last survey conducted showed that national and international unions with headquarters in the United States recorded a decline of 400,000 in membership between 1956 and 1958, reversing an upward trend that had existed for the past two decades."

In order to encourage and foster the process of collective bargaining, it is essential that the law protect the right of unions to negotiate collective bargaining agreements before achieving majority status. We believe the provisions of the National Labor Relations Act were intended to and do protect that right.

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[7] U.S. Department of Labor, B.L.S. Bull. No. 1267, December 1959, pp. 1, 7-9, 15.

III

THE UNFAIR LABOR PRACTICES, IF ANY THERE WERE, INVOLVED IN THE MAKING OF THE STRIKE SETTLEMENT OF AUGUST 30, 1957, COULD NOT INVALIDATE THE SUBSEQUENT FULL COLLECTIVE BARGAINING AGREEMENT OF OCTOBER 10, 1957 OR REQUIRE WITHHOLDING OF RECOGNITION FROM THE UNION UNTIL CERTIFIED

Admittedly the Union had been designated as their bargaining representative by more than a majority of the employees in the appropriate unit on October 10, 1957, when the first complete collective bargaining contract was signed (R. 23-24, 133, n. 3).[68] Both the majority of the Board and the majority of the court below held that this contract, as well as the August 30, 1957 strike settlement memorandum, must be set aside. The Board did not in its decision explain the theory on which it set aside the October 10, 1957 contract. The majority of the court below held that so long as a contract executed when there was no majority was in effect, the union could not obtain a lawful majority. The court below in this respect stated (R. 133, n. 3):

> "* * * The fact that, by October, the union may have achieved a majority status during the period that it maintained an unlawful agreement is irrelevant. *Local Lodge 1424* v. *N.L.R.B.*, 362 U.S. 411, [illegible], *reversing on other grounds* 105 App. D.C. 102, 107, 264 F. 2d 575, 580 (1959). See *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702, 703-705 (1944) and *Joy Silk Mills, Inc.* v. *N.L.R.B.*, 87 U.S. App. D.C. 360, 372, 185 F. 2d 732, 744 (1950), cert. den., 341 U.S. 914 (1951)."

The reliance for this doctrine upon this Court's decision in *Local Lodge 1424, International Association*

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[68] There were 383 employees or less in the unit on October 10, of which the union had a clear majority of 211. See n. 2, p. 6, *supra*.

of Machinists v. *N.L.R.B.*, 362 U.S. 411, is misplaced. At page 414, this Court was merely describing a principle of the Board, which this Court specifically described as "not drawn in question here," the only issue before this Court there being a statute of limitations point, decided so as to eliminate all other issues. Moreover the unlawful agreement involved in the *Machinists* case was a union security agreement, which, of course, does necessarily coerce employees to join and remain members of the contracting union. There was no union security clause in either the August 30, 1957 strike settlement memorandum nor in the October 10, 1957 formal collective bargaining contract here.

Because of the good faith belief of both the Employer and the Union that a majority of the employees had designated the Union before August 30, 1957, there could have been no possible coercive effect on any employee as a result of the exclusive recognition or of the coverage of all employees by the contract. There was nothing in the act of signing the strike settlement or in the terms of the settlement to cause any employee to join or remain a member of the Union.

If good faith is not a defense, and if the exclusive recognition grant was technically an unfair labor practice, it was not the kind of unfair labor practice which either in law or in fact had any effect on the Union's subsequent majority on October 10, 1957.

The policy in favor of collective bargaining contracts requires that otherwise valid contracts should be set aside only for the most compelling reasons. This Court has held that otherwise valid collective bargaining contracts should not be set aside merely because the contracting union received the employer's favor through acts of interference, restraint and coer-

cion, including the discriminatory discharge of six adherents of a rival union. In refusing to set aside the contracts in *Consolidated Edison Co.* v. *N.L.R.B.*, 305 U.S. 197, 236-238, this Court said:

"'* * * Here, there is no basis for a finding that the contracts with the Brotherhood and its locals were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act or that their cancellation would in any way make the order to cease the specified practices any more effective

* * *

"'* * * Moreover, the fundamental purpose of the Act is to protect interstate and foreign commerce from interruptions and obstructions caused by industrial strife. This purpose appears to be served by these contracts in an important degree.

* * *

"The Board insists that the contracts are invalid because made during the pendency of the proceeding. But the effect of that pendency would appropriately extend to the practices of the employers to which the complaint was addressed. See *Jones* v. *Securities & Exchange Comm'n*, 298 U.S. 1, 15. It did not reach so far as to suspend the right of the employees to self-organization or preclude the Brotherhood as an independent organization chosen by its members from making fair contracts on their behalf.

"Apart from this, the main contention of the Board is that the contracts were the fruit of the unfair labor practices of the employers; that they were 'simply a device to consummate and perpetuate' the companies' illegal conduct and constituted its culmination. But, as we have said, this conclusion is entirely too broad to be sus-

tained. If the Board intended to make that charge, it should have amended its complaint accordingly, given notice to the Brotherhood, and introduced proof to sustain the charge. Instead it is left as a matter of mere conjecture to what extent membership in the Brotherhood was induced by any illegal conduct on the part of the employers. The Brotherhood was entitled to form its locals and their organization was not assailed. The Brotherhood and its locals were entitled to solicit members and the employees were entitled to join. These rights cannot be brushed aside as immaterial for they are of the very essence of the rights which the Labor Relations Act was passed to protect and the Board could not ignore or override them in professing to effectuate the policies of the Act. To say that of the 30,000 who did join there were not those who joined voluntarily or that the Brotherhood did not have members whom it could properly represent in making these contracts would be to indulge in extravagant and unwarranted assumption. The employers' practices, which were complained of, could be stopped without imperiling the interests of those who for all that appears had exercised freely their right of choice.

"We conclude that the Board was without authority to require the petitioning companies to desist from giving effect to the Brotherhood contracts, as provided in subdivision (f) of paragraph one of the Board's order.

Here, as in the *Consolidated Edison* case, there was no proof as to how many, if any, of the employees who were members on October 10, 1957, were so as a result of the exclusive recognition given the Union on August 30, 1957. Even if they did join because of the exclusive representation, such motivation was not unlawfully coerced so as to deprive their act of joining

of validity. Here there is far less reason than in the *Consolidated Edison* case to set aside the contracts.

Moreover, if the exclusive recognition clause in the October 10, 1957 agreement was invalid, it was a separable provision. Article XXIX, Section 2, of the contract of October 10, 1957 provides for separability as follows (R. 111):

> "If any provision of this agreement or the application of such provision to any person or circumstance shall be held invalid, the remainder of this agreement, or the application of such provisions to other persons or circumstances shall not be affected thereby."

In *N.L.R.B.* v. *Rockaway News Supply Co.*, 345 U.S. 71, 79, this Court referred to the common law doctrine of separability as well as to the public policy in preserving employee relationships on the basis worked out by an employer and his employees, as reasons for not holding a whole contract invalid because it contained an illegal union security provision. This Court said:

> "The total obliteration of this contract is not in obedience to any command of the statute. It is contrary to the common-law contract doctrine. * * * We see no sound public policy served by it. Realistically, if the formal contract be stricken, the enterprise must go on—labor continues to do its work and is worthy of some hire. The relationship must be governed by some contractual terms. There is no reason apparent why terms should be implied by some outside authority to take the place of legal terms collectively bargained. The employment contract should not be taken out of the hands of the parties themselves merely because they have misunderstood the legal limits of their

bargain, where the excess may be severed and separately condemned as it can here."

Another case severing the unlawful clause and upholding the balance of the collective agreement is *Plumbers Union* v. *Dillion*, 9th Cir., 1958, 255 F. 2d 820, 823.

To the same effect see *N.L.R.B.* v. *Gaynor News Co.*, 2d Cir., 1952, 197 F. 2d 719, 724, affirmed without consideration of this issue, 347 U.S. 17, 37, n. 35, where the court said:

> "The Board argues that the entire contract must be voided and collective bargaining relations suspended, or otherwise the union will 'be permitted to continue to enjoy a representative status strengthened by virtue of the illegal contract.' * * * we believe the remedy works out too harshly here. * * * We do not, however, think that the possible danger to employees of allowing some collective bargaining relations with this union outweighs the substantial harm to them in taking away for an indefinite period all collective bargaining rights. We have therefore decided to refuse to enforce those parts of the Board's order which prohibit any contractual relations between the employer and this or any other union until such time as the Board gets around to considering and making a decision on this or any other union's petition for certification."

Similarly in *Puerto Rico S.S. Ass'n.* v. *N.L.R.B.*, D.C. Cir., 1960, 281 F. 2d 615, 618, the court refused to set aside an entire contract solely because of an illegal preferential hiring clause. The court stated:

> "Having in mind the nature of the violation, and in the absence of any proof of conduct under the clause in question, we see no rational basis for

the remedy ordered by the board. Nor do we see how it could effectuate the policies and purpose of the Act to destroy a contractual relationship which has resulted in labor peace of a number of years.' There is no competing union in the picture; there are no inequities shown; and enforcement of the order would result in there being a considerable period of time while an election is being arranged and held, during which period the employees would be working without a contract and would have no bargaining representative to handle such matters as grievances. We believe that enforcement of this portion of the order would not aid in the maintenance and promotion of industrial peace and would not aid in the 'healthy policy of promoting production and employment.'"

In the instant case the Board order is so broad as to bar the Employer from dealing with the Union even as the representative of its own members in such matters as grievances pending the establishment of its majority in an election (R. 16-18). If any order at all is indicated, certainly by acceptable standards the order here is much broader than can be justified. As indicated by the above court cases modifying Board orders which upset collective bargaining contracts because of unfair labor practices not of such a character as to vitiate the whole contract, the imposition of such orders by the Board is not limited to this case and should be corrected by this Court. These orders indicate the same narrow restrictive approach to collective bargaining as is apparent in the finding that the Employer and the Union committed unfair labor practices by making an arithmetical error when they agreed to cease their former hostility and to sign a collective bargaining agreement.

All considerations of sound labor policy require that the Union's contract of October 10, 1957 be held valid and that the Union be permitted to continue to act as the exclusive bargaining representative. If any change is to be authorized in its representative status, there certainly is no reason to deprive it of full power to bargain collectively on behalf of and represent its members.

There is one final point requiring emphasis. By its decision in *Textile Workers Union of America* v. *Lincoln Mills*, 353 U.S. 448, 456, this Court has established that the whole law of collective bargaining in its substantive aspects is based on "federal law which the courts must fashion from the policy of our national labor laws." This Court likewise (at p. 457) pointed to the National Labor Relations Act as one of the national labor laws which "expressly furnishes some substantive law. It points out what the parties may or may not do in certain situations."

It follows that what the Board and the courts do with the instant case will establish law applicable to the validity and enforceability of collective bargaining contracts in arbitration proceedings, state courts or proceedings under Section 301 of the Labor Management Relations Act, 61 Stat. 156, 29 U.S.C. 185. In short the ramifications of the ruling in this case can be far reaching. To hold the instant contract unlawful and unenforceable as the National Labor Relations Board has done is to imperil the many thousands of contracts throughout the country where the parties in good faith, but without conclusive determination of the difficult issue of majority, have entered into genuine arm's length collective bargaining and have arrived at a mutually acceptable working arrangement to govern wages, hours and employment relationships.

CONCLUSION

For the foregoing reasons it is respectfully urged that the decision below be reversed with directions to enter a decree setting aside the Board's order.

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